

# The Prevention Justification for Affirmative Action

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*An impressive body of research shows that minorities and women are less likely to succeed in workplaces where they are present in token numbers. Discrimination is more likely to hold back blacks and women in workforces with a dramatic racial or gender imbalance. Thus, an employer seeking to prevent future discrimination in the workplace might use preferences to achieve a better racial or gender balance.*

*The Supreme Court has consistently explained that the primary purpose of Title VII is to encourage employers to prevent workplace discrimination. An affirmative action plan that used preferences to achieve a better racial or gender balance would be consistent with that purpose. More importantly, a close look at the Court's Title VII affirmative action jurisprudence reveals that this "prevention justification" is consistent with existing doctrine. The Article concludes with a detailed explanation of whether and how an affirmative action plan aimed at preventing future discrimination could satisfy existing Title VII doctrine.*

## I. INTRODUCTION

Employment discrimination against blacks and women is responsible in part for several persistent labor market phenomena: differential work force participation rates, differential earnings, and job segregation.<sup>1</sup> There is

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<sup>1</sup> While other forces are no doubt responsible for these disparities, including differences in education, training, worker preferences, and geographic proximity to jobs, studies continue to show discrimination persists. See, e.g., MARIANNE BERTRAND & SENDHIL MULLAINATHAN, ARE EMILY AND BRENDAN MORE EMPLOYABLE THAN LAKISHA & JAMAL? A FIELD EXPERIMENT ON LABOR MARKET DISCRIMINATION (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2003) (showing a significant gap in the rate of callback interviews for similarly situated applicants with black- as opposed to white-sounding names and showing that black applicants benefit less than white applicants from improved credentials); William A. Darity & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, 12 J. ECON. PERSP. 63 (1998) (reviewing statistical research, court cases, and audit studies); Cynthia L. Estlund, *Work and Family: How Women's Progress at Work (and Employment Discrimination Law) May be Transforming the Family*, 21 COMP. LAB. L. & POL'Y J. 467, 468 (2000) (explaining that gender-based differences in workforce participation,

an extensive literature urging modification of Title VII doctrine to further reduce the role of discrimination in producing these differential outcomes.<sup>2</sup> However, many acknowledge that fine-tuning the doctrine will likely achieve only modest goals because the disparate treatment and disparate impact conceptions of discrimination are underinclusive. Cognitive biases not captured by the concept of disparate treatment and workplace structures and practices not subject to attack via disparate impact doctrine stand in the way of equal employment opportunity.<sup>3</sup> Some commentators have therefore urged aggressive reconfiguration of Title VII doctrine to reflect a more complete understanding of discrimination. However, as I have written elsewhere, I am skeptical about the efficacy of an approach to equal employment opportunity primarily focused on making it easier for Title VII plaintiffs to prevail in court. While the limitations of existing doctrine are increasingly apparent, insights about the nature of discrimination and the reality of Title VII enforcement might be more effectively brought to bear in the form of alternatives or adjuncts to traditional Title VII enforcement.<sup>4</sup>

This Article is part of that ongoing project. Here I consider the implications of a broader conception of discrimination for employers' voluntary

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incomes, and segregation are "still formidable"); CLAUDIA GOLDIN & CECILIA ROUSE, ORCHESTRATING IMPARTIALITY: THE IMPACT OF "BLIND" AUDITIONS ON FEMALE MUSICIANS (Nat'l Bureau of Econ. Research, Working Paper No. 5903, 1997) (concluding that much of the increase—between 25% and 55%—in the number of female musicians in the top five symphony orchestras in the United States can be explained by the use of "blind" auditions with a screen to conceal the identity of the candidate from the selectors); Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 599–602 (2000) (reviewing study results); Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 974–76 (1997) (showing that the black middle class is occupationally disadvantaged compared to the white middle class); DAVID NEUMARK ET AL., SEX DISCRIMINATION IN RESTAURANT HIRING: AN AUDIT STUDY (Nat'l Bureau of Econ. Research, Working Paper No. 5024, 1995) (reporting results of a small-scale audit study of 65 restaurants in Philadelphia showing statistically significant evidence of sex discrimination against women applying for server positions in high-price and higher-earnings restaurants and weaker evidence of discrimination in favor of women in low-price restaurants); Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 743–50 (2000) (discussing the contributory role of statistical discrimination in the gender wage gap).

<sup>2</sup> See, e.g., Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 588–97 (reviewing some of this literature).

<sup>3</sup> See Linda Hamilton Kreiger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1304 (1998) [hereinafter *Perestroika*].

<sup>4</sup> See Yelnosky, *supra* note 2; Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REF. 403 (1993); Michael J. Yelnosky, *Mediation?*, 53 N.Y.U. ANN. CONF. ON LAB. (David Sherwyn ed., forthcoming 2003); Michael J. Yelnosky, *Salvaging the Opportunity: A Response to Professor Clark*, 28 U. MICH. J.L. REF. 151 (1994); Michael J. Yelnosky, *Using Mediation to Resolve Equal Employment Opportunity Commission Discrimination Charges*, in WILEY EMPLOYMENT LAW UPDATE 21 (Henry H. Perritt, Jr. ed. 1995).

antidiscrimination efforts. Understanding the ways in which cognitive biases and workplace structures stand as obstacles to the advancement of women and minorities has important implications for affirmative action in employment. This broader conception suggests that employers could use gender or racial preferences in their efforts to prevent discrimination against women and racial minorities.

Essential to this “prevention justification” for affirmative action is appreciation of some of the theoretical and empirical research in cognitive psychology and organizational behavior. I explore that body of work in the first part of this Article. One important insight of this research is that in workplaces where women or minorities are present in small numbers, they are less likely to succeed than if they constitute a larger share of the workforce. “Token status” itself triggers stereotyping and leads to other predictable behaviors by co-employees and tokens that make success for tokens less likely. This point is central to the claim that employers could prevent some workplace discrimination by consciously increasing the number of blacks or women in their workplaces.

But using preferences to increase minority or female representation in a workforce is often not enough to prevent future discrimination. The specific way in which preferences are used and the context in which they are used is important. Moreover, employers can make race- or sex-neutral changes in standard operating procedures that can reduce the likelihood of discrimination. An effective discrimination prevention program would thus focus both on relative numbers and on other steps that reduce the likelihood that bias would affect decision making.

I next show that such an approach to preventing workplace discrimination is surprisingly consistent with current Title VII doctrine. Since *Griggs v. Duke Power Co.*,<sup>5</sup> its first decision interpreting Title VII, the Supreme Court has regularly pronounced that a primary purpose of Title VII is to encourage employers to take steps to prevent workplace discrimination. Most recently the Court has been even more emphatic about that prophylactic purpose. In a series of recent decisions it has encouraged and perhaps required employers to take steps to prevent discrimination by making liability for certain types of sexual harassment and for punitive damages depend on the reasonableness of an employer’s discrimination prevention efforts.

Thus, I show how a court could conclude that an affirmative action plan with a goal of preventing discrimination “mirrored the purposes of Title VII,” a current doctrinal requirement. I conclude this Part by showing that this fit between the prevention justification and the purposes of Title VII is tighter than the fit between the purposes of Title VII and the two most commonly asserted justifications for affirmative action in employment: (1) the remedial justification; and (2) the diversity justification.

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<sup>5</sup> 401 U.S. 424 (1971).

The Article concludes with a more detailed discussion of how a discrimination prevention program that incorporated race- or sex-conscious preferences would fare in light of the “proper purpose” requirement, and in light of the Supreme Court’s other requirement for an affirmative action plan under Title VII—that the plan not “unnecessarily trammel the interests of nonminority employees.” The justification fares well, on balance, but not without qualification. Under existing law, an employer may use preferences where there is a manifest imbalance between the gender or racial composition of the employer’s workforce and the relevant labor pool, and the employer may use those preferences to attain something closer to proportional representation in its workforce. The prevention justification, by contrast, would permit an employer to use preferences if there is an imbalance between the numbers of blacks and whites in its workforce, regardless of their relative representation in the relevant labor pool. Moreover, it could authorize the employer to attain more than proportional representation of blacks in its workforce—representation that exceeds “token status.” These are doctrinal shifts, and they are not exactly subtle, but they would not require reworking existing law and its focus on identifying (1) numerical underrepresentation, and (2) targets for more balanced representation.

All things considered, I am convinced that this approach warrants close analysis. It is consistent with a body of existing research and mostly consistent with existing law. My suggested approach is actually more modest than existing law in one sense—it requires employers who use preferences to do so only in the context of a transparent and comprehensive discrimination prevention program. The essence of my argument is quite simple. The full flourishing of efforts at discrimination prevention requires paying attention to relative numbers and doing so is consistent with existing doctrine.<sup>6</sup>

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<sup>6</sup> The long gestation period of this Article can partly be explained by my reluctance to enter into a conversation—the one about affirmative action—that can seem “repetitive, and morbidly so.” Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1845 (1996). However, I am certain we have not been here before.

A few scholars have, without elaboration, stated that affirmative action might prevent discrimination. See, e.g., CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE 113–14 (1996); Fran Ansley, *Classifying Race, Racializing Class*, 68 U. COLO. L. REV. 1001, 1020 (1997); Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decisionmaking Under Title VII*, 39 ARIZ. L. REV. 1003, 1048–49 (1997). A few others have offered a brief sketch of how affirmative action might do so. See, e.g., Donald L. Beschle, “*You’ve Got to be Carefully Taught*”: *Justifying Affirmative Action After Croson and Adarand*, 74 N.C. L. REV. 1141, 1174–80 (1996) (arguing that the government can implement programs designed to counteract “unconscious” or “institutional” racism so long as those programs do not employ racial preferences but are limited to steps to alert decision makers to the possibility that they are acting in a biased manner); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1080–82 (1995) (explaining that the “status-production model of discrimination” suggests affirmative

## II. FOUNDATIONS OF "THE PREVENTION JUSTIFICATION" FOR AFFIRMATIVE ACTION UNDER TITLE VII

### A. Theoretical and Empirical Foundations of The Prevention Justification

A body of work from various disciplines shows that much stereotyping is ordinary, automatic, and unconscious. It is also contextual: the environment in and processes by which decisions are made can increase or decrease the likelihood that stereotyping will adversely affect a particular decision. These principles form the basis of the claim that employers could take steps, including making race- or sex-conscious employment decisions, to decrease the likelihood that stereotyping will lead to adverse outcomes for women or minorities in their organizations.

The foundational work here is Rosabeth Kanter's 1977 book, *Men and Women of the Corporation*.<sup>7</sup> Kanter's study of a large multinational firm concluded that the firm's organization and the distribution of people within it contributed to the inferior status of women there.<sup>8</sup> In expanding on this

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action might combat discrimination because bringing blacks into groups that would otherwise be all-white makes it difficult for the whites to harm black members of the group without also hurting themselves); cf. Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1277-314 (1995) (arguing that a profit-maximizing employer might implement an affirmative action program to overcome the efficiency losses caused by persistent workplace discrimination, including unconscious discrimination, and that under *Bakke* these benefits to the firm would serve as a legal justification for the use of affirmative action).

I offer here the first thorough discussion of the theoretical, empirical, and doctrinal justifications for and implications of a discrimination prevention program that, in part, uses racial or gender preferences to increase the number of blacks or women in a workplace.

My discussion is limited to affirmative action to prevent discrimination against blacks and women, although I am not precluding application of the same approach to other protected classes under antidiscrimination law. The social science on which the approach is based focuses mainly on blacks and women, as do the only two Supreme Court decisions ruling on the legality of affirmative action in employment under Title VII. For a detailed discussion of the standard categories used in affirmative action plans, see Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855 (1995); Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1 (2002).

<sup>7</sup> ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* (1993 ed.). Although discussion of the effects of differences in proportional representation within collectives did not begin with Kanter, her treatment provided a useful theoretical framework for the area of inquiry and has spawned a considerable amount of literature. See Pamela Braboy Jackson et al., *Composition of the Workplace and Psychological Well-Being: The Effects of Tokenism on America's Black Elite*, 74 SOC. FORCES 543 (1995).

<sup>8</sup> KANTER, *supra* note 7, at xv. Kanter saw herself as exploring the effects of "structuralism," which she described as the way in which worker consciousness and behavior are formed by experiences in organizations. *Id.*

“distributional” point, Kanter emphasized the relative representation of men and women in the organization. “Token” status, “rarity,” and “scarcity” of women powerfully shaped, she explained, the behavior of both women and men in an organization. Kanter referred to members of any group that represented less than approximately 15% of the workforce as “tokens.”<sup>9</sup> She found that tokens are regularly stereotyped and viewed as representatives of their category because there are not a sufficient number of individuals to easily defeat generalizations about their behavior.<sup>10</sup> Tokens are thus more likely to be forced into limited and caricatured roles, a process Kanter referred to as “role encapsulation”.<sup>11</sup> She also found that when tokens are introduced into a previously homogeneous work group, dominants tend to exaggerate their own commonality to distinguish themselves from tokens, whose differences from the dominants are also exaggerated.<sup>12</sup> Moreover, the visibility of tokens increases performance pressure and stress because it is more likely people will notice a token’s performance.

In short, according to Kanter:

People whose type are present in small numbers tend to be more visible, feel pressure to conform, often try to become invisible, find it hard to gain credibility, feel isolated and peripheral, can be excluded from informal peer networks, have fewer opportunities to be sponsored, face stress, and are often stereotyped.<sup>13</sup>

Thus, for Kanter, the number of men and women in particular jobs is most important not because those numbers might be signs of discrimination in an organization,<sup>14</sup> but because stereotyping, work performance, promotion

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<sup>9</sup> *Id.* at 208.

<sup>10</sup> *Id.* at 210–11.

<sup>11</sup> *Id.* at 230.

<sup>12</sup> *Id.* at 222–25. She found that the resulting isolation of tokens made it quite difficult for them to develop the mentoring and sponsorship relationships with dominants that are often essential to success in organizations. *Id.* at 220–21, 230.

<sup>13</sup> *Id.* at 248. These dynamics of tokenism, Kanter explained, seemed more dramatic in managerial jobs, where the exercise of discretion is essential and a premium is thus placed on homogeneity and conformity, which are seen as proxies for loyalty, trustworthiness, and ease of communication. *Id.* at 49–68.

<sup>14</sup> *Cf.* *Int’l Bd. of Teamsters v. United States*, 431 U.S. 324, 339–40 n.20 (1977). The Court stated:

Statistics showing racial or ethnic imbalance are . . . often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

*Id.*

prospects, and psychic distress often depend on relative numbers.<sup>15</sup> This proposition—that changing the racial or gender composition of the workplace will change the way in which organizational rewards are distributed—has been referred to as Kanter’s “redistributive hypothesis.” As the ratio in a workgroup of men and women reaches 65:35, she wrote, the effects of minority status are less exaggerated: women become individuals differentiated from each other as well as a type differentiated from the majority. Outcomes for individuals in such a group will depend less on group membership and more on other personal factors, including differentiated abilities.<sup>16</sup> Numerous studies have confirmed, expanded, and refined Kanter’s theory.<sup>17</sup> To summarize this body of work, the redistributive

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<sup>15</sup> KANTER, *supra* note 7, at 6, 242.

<sup>16</sup> *Id.* at 208–09. “Being part of a group represented in large numbers . . . increased the odds of success without having to prove extraordinary competence. Being one of very few . . . created special performance pressures which made it easier to be derailed.” *Id.* at 292.

<sup>17</sup> See Elizabeth Chambliss & Christopher Uggen, *Men and Women of Elite Law Firms: Reevaluating Kanter’s Legacy*, 25 LAW & SOC. INQUIRY 41 (2000) (finding that increased representation of women, African-Americans, Hispanics, and Asian-Americans at the partner level of elite law firms was positively correlated with increased representation of members of those groups at the associate level); Liliane Flöge & Deborah M. Merrill, *Tokenism Reconsidered: Male Nurses and Female Physicians in a Hospital Setting*, 64 SOC. FORCES 925 (1986) (finding that Kanter’s hypothesis was overinclusive in that female physicians, and not male nurses, were held back in career advancement by their token status); Dafna N. Izraeli, *Sex Effects or Structural Effects? An Empirical Test of Kanter’s Theory of Proportions*, 62 SOC. FORCES 153 (1983) (finding support for Kanter’s theory but noting that other institutional factors influence the amount of diminution of sex stereotyping); Jackson et al., *supra* note 7 (finding that both token women and token blacks in “elite” positions are more likely to be depressed and anxious than women and blacks in more balanced workplaces); Charles G. Lord & Delia Saenz, *Memory Deficits and Memory Surfeits: Differential Cognitive Consequences of Tokenism for Tokens and Observers*, 49 J. PERSONALITY & SOC. PSYCHOL. 918 (1985) (validating, in experimental setting, Kanter’s observation that tokens and non-tokens attract differentially attentive audiences); Eve Spangler et al., *Token Women: An Empirical Test of Kanter’s Hypothesis*, 84 AM. J. SOC. 160 (1978) (finding evidence that performance pressure, social isolation, and role entrapment all operate to diminish the achievements of women law students where they are only a small minority of the student body); Shelley E. Taylor et al., *Categorical and Contextual Bases of Person Memory and Stereotyping*, 36 J. PERSONALITY & SOC. PSYCHOL. 778 (1978) (finding support for the hypothesis that salience, by virtue of numerical distinctiveness, leads to exaggerated perceptions of prominence and exaggerated evaluations); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 561 (1996) (reporting that the number of black lawyers already working in a particular firm is positively correlated with that firm’s likelihood of hiring additional black attorneys and that the work lives of the few black lawyers in large law firms support Kanter’s findings about the effects of token status); Janice D. Yoder, *Looking Beyond Numbers: The Effects of Gender Status, Job Prestige, and Occupational Gender-Typing on Tokenism Processes*, 57 SOC. PSYCHOL. Q. 150 (1994) (stating that Kanter’s thesis has been demonstrated across a variety of token groups in a broad range of occupations and finding support for the thesis in her own study, but noting that an increase in proportional representation is not sufficient to rid workplaces of gender-based

hypothesis Kanter articulated in a study of female tokens has been shown to affect black tokens, token status has been shown to have less adverse impact on white men, and while increasing the representation of blacks and women decreases the negative impact of token status, it does not eliminate race- or gender-based discrimination.<sup>18</sup>

Other research, this in the area of sexual harassment, found that women “pioneers,” those among the first to enter male-dominated occupations, often reported pervasive and severe harassment and hostility.<sup>19</sup> The more recent research into this phenomenon confirms that women in male-dominated workplaces experience more harassment than women in other workplaces and that a gender imbalance in the workforce is a more likely predictor of sexual harassment than the presence of a woman in a traditionally male job as measured by national occupational statistics.<sup>20</sup>

In a pair of seminal articles, Linda Hamilton Krieger explained that research in cognitive psychology helped explain the observations made and explanations offered by Kanter and others, and she began to consider the implications of that

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discrimination); see generally Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1214 (2002); Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2381 (1994); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L.L. REV. 91, 106 (2003); Stephen C. Wright, *Tokenism, Ambiguity and the Tolerance of Injustice*, in *THE PSYCHOLOGY OF LEGITIMACY* 223–54 (John J. Jost & Brenda Major, eds., 2001).

<sup>18</sup> See *id.*

<sup>19</sup> James E. Gruber, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 GENDER & SOC'Y 301, 306 (1998).

<sup>20</sup> *Id.* (concluding that sexual harassment is more generally a function of workplace dynamics than occupational membership—“that what a woman does for a living is less important than where she does her job”); See also Chamallas, *supra* note 17, at 2382–83; Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 327 (1998) (noting an inverse relationship between the level of gender integration and the level of sexual harassment); Louise F. Fitzgerald et al., *Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model*, 82 J. APPLIED PSYCHOL. 578, 586 (1997). That the number of women in a particular job category is an important predictor of sexual harassment is a central aspect of Vicki Schultz's important structural account of workplace sexual harassment. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1800–01 (1998) (proposing that courts in sexual harassment cases should consider, for example, whether women were present in skewed sex ratios, which meant they were likely to find themselves unwelcome among the men who outnumbered them); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2177 (2003) (arguing for a legal regime in which the more firms integrate women and men equally into all lines of work and levels of authority, the less likely they will be to incur liability for hostile environment sexual harassment).



research for antidiscrimination law.<sup>21</sup> The body of research Krieger shared with the legal academy shows that much bias against women and minorities is not the product of a corrupt choice to discriminate, but instead results from the natural tendency of individuals to use categories.<sup>22</sup> Cognitive bias occurs, not consciously at the time of the adverse decision, but unconsciously and unintentionally when stereotypes caused by using categories (e.g., “man,” “woman,” “black,” “white”) subtly distort the way an employer perceives, interprets, stores, and then recalls information about an individual’s job performance. Thus, at the moment of decision, biased decision makers can in good faith believe their decisions are based on “the facts.”<sup>23</sup>

Krieger explained that an important determinant of cognitive bias is salience. Kanter had observed that token status affects performance evaluations, and Kreiger showed that cognitive psychologists have explained why intergroup ratings of tokens or solos in a group are likely to be more extreme than ratings of members of the dominant group.<sup>24</sup> People are more likely to notice the actions of a token or solo and people have a more complex schema of their own group than of other groups, which results in more moderate judgments of ingroup members. As familiarity increases, one’s awareness increases of the number and complexity of evaluative dimensions along which individual group members may be characterized. Consequently, one feels the need for more data before confidently evaluating a member of her own group.<sup>25</sup> The most recent studies of how stereotypes operate in the human mind confirm the basic findings of the work on which Professor Krieger’s articles were based—people are often completely

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<sup>21</sup> Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) [hereinafter *Categories*]; *Perestroika*, *supra* note 3.

<sup>22</sup> *Categories*, *supra* note 21; *Perestroika*, *supra* note 3.

<sup>23</sup> *Categories*, *supra* note 21, at 1177–209; see ZIVA KUNDA, SOCIAL COGNITION 315–16 (2000) (explaining that from the perspective of social cognition theory, stereotypes are cognitive structures that contain our knowledge, beliefs, and expectations about a social group and can color our interpretations of their behavior and traits).

<sup>24</sup> *Perestroika*, *supra* note 3, at 1287–88 (explaining that polarized evaluations of distinctive members of an otherwise largely homogeneous group are common because people pay particularly close attention to distinctive stimulus objects, such as a token women or minority group member, and the poor performance of a distinctive minority group member is more likely to be remembered than the poor performance of a majority group member).

<sup>25</sup> *Categories*, *supra* note 21, at 1193. The presence of relatively equal numbers of members of different gender, racial, or ethnic categories within a social situation renders category distinctions less salient. A category, explained Krieger, such as black, women or Hispanic, will become increasingly differentiated as a perceiver gains more familiarity with its constituents. *Perestroika*, *supra* note 3, at 1267 n.53; see Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 486 (2001) (citing sources explaining that unique employees are at risk of being more harshly evaluated than others).

unaware of their use of stereotypes and behave in ways that are exactly contrary to their asserted conscious beliefs.<sup>26</sup> These studies also show how the threat that they may be judged based on a stereotype and not on their performance can negatively impact the performance of women and minorities.<sup>27</sup>

Thus, Kanter's focus on balancing the numbers of socially different kinds of people in a workplace is supported by the most recent research. The implications for affirmative action seem clear: Employers could reduce discrimination against blacks in an organization by increasing their representation in the workforce. It appears that racial stereotypes can be changed through exposure to numerous examples of individuals who moderately disconfirm the group stereotype.<sup>28</sup> However, a few examples may not suffice because people tend to respond to individuals who do not confirm a strongly held stereotype by creating a subtype rather than modifying the preexisting stereotype.<sup>29</sup> Moreover, the research shows that discrimination can persist in more balanced workforces.<sup>30</sup>

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<sup>26</sup> See Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1243 (2002).

<sup>27</sup> See Laurie L. Cohen & Janet K. Swim, *The Differential Impact of Gender Ratios on Women and Men: Tokenism, Self-Confidence, and Expectations*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 876 (1995) (explaining that stereotype threat may cause women to avoid certain jobs); Lord & Saenz, *supra* note 17 (showing that token status has a detrimental effect on performance because the token's preoccupation with self-distinctiveness and self-presentational strategies means the token pays less attention to the task to be performed); Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOL. 613 (1997) (explaining how stereotype threat can depress students' intellectual performances in educational settings); Wilkins & Gulati, *supra* note 17 (discussing the implications for black law firm associates). Darren W. Davis & Brian D. Silver, *Stereotype Threat and Race of Interviewer Effects in a Survey on Political Knowledge* (2002) (paper presented at Annual Meeting of Midwest Political Science Association) (on file with author) (finding support for stereotype threat hypothesis in experiment showing that black respondents to a battery of questions about political knowledge get fewer answers right when interviewed by a white interviewer than when interviewed by a black interviewer).

For a discussion of some of the special pressures on women and minorities to signal conformity and therefore to work their identity to "fit in," see Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000). In a subsequent work, the authors suggest steps employers could take to ameliorate these pressures. See Devon W. Carbado & Mitu Gulati, *The Economics of Race and Gender: Conversations at Work*, 79 ORE. L. REV. 103 (2000).

<sup>28</sup> See Blasi, *supra* note 26, at 1279; see also KUNDA, *supra* note 23, at 383, 390–91 (explaining that contact will most likely reduce stereotyping where it takes place between individuals of equal status, where it is sufficiently extensive for the individuals to get to know each other, and where the individuals share a common goal and actively cooperate).

<sup>29</sup> See KUNDA, *supra* note 23, at 384–91; see also Blasi, *supra* note 26, at 1269. Kanter's suggestion of batch hiring is responsive to this concern, but employers are rarely in a position to fill a large number of vacant or newly created positions in the near term. KANTER, *supra* note 7, at 222; see *Perestroika*, *supra* note 3, at 1276 (stating that rapid integration, which increases opportunities for individuating interaction between members of socially different groups and a

Relying on numbers-balancing alone would ignore other crucial research in cognitive bias. Recall the basic insight: The culture makes race and gender categories salient, and solo or token status in a workplace makes group membership even more salient.<sup>31</sup> Dealing with the solo or token status problem by making race- or sex-conscious employment decisions increases the salience of race or gender. The increased salience of race or gender caused by their overt use in decision making can trigger more racial or gender stereotyping.<sup>32</sup> For example, using preferences may tend to exacerbate subtle forms of intergroup bias in the evaluation of affirmative action beneficiaries if people assume those selected are less qualified and less capable than others.<sup>33</sup> Susan Sturm has recently made the related point that an employer making decisions with an eye toward racial balancing alone will likely have to contend with claims of simple give-back racism by members of the less favored group.<sup>34</sup> The presence of blacks or women in higher-level jobs is not inconsistent with the stereotype if their presence can be explained away by preferential selection.<sup>35</sup> Finally, some studies show that preferences injure beneficiaries by creating or reinforcing an internal sense of stigma and self-doubt and by creating disincentives to investment in human capital.<sup>36</sup>

Thus, workplace integration and the opportunities it creates for interaction between members of different groups is necessary to the elimination of intergroup bias,<sup>37</sup> but it is not sufficient, particularly if the process of integration makes

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newly created sense of group identity can hardly be underestimated in its ability to eliminate intergroup bias).

<sup>30</sup> See *supra* note 17.

<sup>31</sup> *Perestroika*, *supra* note 3, at 1281 (noting that early in life one learns the stereotypes of the major social groups in the United States, they are invoked automatically when a member of the group is encountered, and they help make sense of incoming behavioral information, particularly that which is consistent with the stereotype).

<sup>32</sup> *Id.* at 1267. Cynthia Estlund has called this the potential “backfire effect” of preferences. Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 89 (2000).

<sup>33</sup> *Perestroika*, *supra* note 3, at 1263–65.

<sup>34</sup> Sturm, *supra* note 25, at 539–42 (2001) (explaining that employers diversifying their work forces must create the internal infrastructure to support and maintain productive conflict resolution); see KANTER, *supra* note 7, at 316–36 (explaining that moving towards more balanced work groups can create resistance, dissatisfaction, and tension); KUNDA, *supra* note 23, at 361–65 (explaining that people are especially likely to apply negative stereotypes to individuals when they are motivated to affirm their self-worth).

<sup>35</sup> *Perestroika*, *supra* note 3, at 1269; cf. McAdams, *supra* note 6, at 1082 (explaining that raising the salience of race can make the urge to produce status through race discrimination more powerful).

<sup>36</sup> *Perestroika*, *supra* note 3, at 1261–63; see also Jackson et al., *supra* note 7.

<sup>37</sup> *Perestroika*, *supra* note 3, at 1276.

group membership more salient and otherwise heightens intergroup tensions.<sup>38</sup> However, some of these “backfire effects” appear to be contextual. Where employees understand that merit criteria predominate in decision making and that race and gender are simply “plus” factors or tie-breakers, affirmative action programs are more likely to be viewed as fair, resulting in less resentment by non-beneficiaries and less self-doubt among beneficiaries.<sup>39</sup> Finding ways to promote identification with the larger group and to foster intergroup cooperation are especially important in minimizing potential backfire effects.<sup>40</sup>

Of equal importance is research suggesting that there are race- and sex-neutral ways to help reduce intergroup bias, even in environments where blacks and women are outnumbered.<sup>41</sup> An employer taking these steps in addition to increasing the representation of outgroup members in its workforce could credibly assert that its actions would likely prevent some amount of workplace discrimination against those employees.

For example, automatically activated stereotypes are less likely to influence decisions in an environment where antidiscrimination and fairness norms operate.<sup>42</sup> Statements of company policy and workplace practices designed with

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<sup>38</sup> KANTER, *supra* note 7, at 279 (finding that the question is not simply whether to integrate, but how women and minorities can be integrated with peers in empowering ways); *see also* Henry Etkowitz et al., *The Paradox of Critical Mass for Women in Science*, SCI., Oct. 7, 1994, at 51 (attaining critical mass only partly resolved the dilemma of women in academic departments); David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV., Sept.–Oct. 1996, at 79 (explaining why many diversity initiatives heighten racial tensions and hinder corporate performance).

<sup>39</sup> BARBARA RESKIN, *THE REALITIES OF AFFIRMATIVE ACTION IN EMPLOYMENT* 54–59 (1998) (emphasizing that employers should take steps to ensure that all understand qualifications are the primary consideration in all job assignments and promotions); *Perestroika*, *supra* note 3, at 1261–65, 1292 (discussing research showing that in some circumstances if beneficiaries of preferences receive positive performance feedback and are told that qualifications as well as group membership have been used in decision making, negative effects on motivation, commitment, task selection, and group cooperation are reduced). Transparency also forces institutions to bear more of the costs of adopting preferences, if there are costs, instead of shifting them to third parties. *See* Schuck, *supra* note 6, at 90.

<sup>40</sup> *See* Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory: Crossroads, Directions, and a New Critical Race Theory*, 112 YALE L. J. 1757, 1799–801 (2003) (discussing strategies for managing workplace heterogeneity); Estlund, *supra* note 32, at 28–29; *Perestroika*, *supra* note 3, at 1270–76.

<sup>41</sup> Blasi, *supra* note 26, at 1272 (“[A]ll of us can resist relying on stereotypes in making important decisions—under the right conditions.”); *Perestroika*, *supra* note 3, at 1312–28 (explaining that the “ecology” of intergroup relations is important because intergroup bias increases or decreases in response to contextual, environmental factors).

<sup>42</sup> *See* KUNDA, *supra* note 22, at 366 (noting the presence of some evidence that people pay more attention to individuating information about a stereotyped group member when the information clashes with the stereotype and when they are motivated to see that person accurately); *see also* Blasi, *supra* note 26, at 1276. Moreover, articulating antidiscrimination

the explicit goal of assuring that all employees are treated fairly might reduce the influence of stereotyping on employment decision making.<sup>43</sup> Education and training about the role of unconscious stereotyping in decision making may also pay dividends, because being aware of the possibility of unconscious stereotyping is another important factor in overcoming its influence.<sup>44</sup>

Susan Sturm has studied companies that redesigned their systems of decision making, work assignment, and conflict resolution to identify, address, and minimize what she refers to as “second generation discrimination”—differential outcomes produced by cognitive biases, structures of decision making, and patterns of interaction.<sup>45</sup> She found that successful systems integrated principles of fairness and productivity into the process of making individual employment decisions and conducting day-to-day operations.<sup>46</sup>

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and fairness norms and incorporating them into workplace practices appears to be the most effective way to ameliorate some of the backfire effects of race- or sex-conscious decision making. See *supra* notes 37–41 and accompanying text; see also *infra* notes 43–47 and accompanying text.

<sup>43</sup> Blasi, *supra* note 26, at 1277 (reporting that studies show merely hearing words like “fairness” can cause people to behave as if they are committed to being fair).

<sup>44</sup> See KUNDA, *supra* note 23, at 340–43; see also Blasi, *supra* note 26, at 1272 (explaining that prejudice-free responses are possible if people are aware of their biases, motivated to change, and possess the cognitive resources to develop and practice correction strategies); *Perestroika*, *supra* note 3, at 1286 (strong motivation, a great deal of capacity, attention, and practice, and the application of deliberate, controlled, corrective processes are necessary to prevent stereotypes and subtle ingroup priming valences from biasing interpersonal judgment).

<sup>45</sup> Sturm, *supra* note 25, at 491–520 (reporting results of study of practices at Deloitte & Touche, Home Depot, and Intel). For a thorough treatment of the concept of “institutional racism”—the notion that institutional norms and practices produce conduct that entrenches racial hierarchy, even among those who genuinely do not intend to discriminate—see Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

<sup>46</sup> Sturm, *supra* note 25, at 519–22. The systems adopted at these companies to address workplace bias employed gender- or race-neutral practices such as: (1) workshops to raise awareness of gender dynamics; (2) internal dispute resolution; (3) requirements that a minimum number of applicants be interviewed for a position; and (4) the use of uniform, structured, interview questions. The systems also employed gender- or race-conscious practices such as: (1) comparing gender utilization between offices and to benchmarks established by the firm; (2) encouraging formation of women’s management groups to allow women to identify issues and network; (3) identifying overutilization or underutilization of men or women in a particular unit; and (4) reviewing aggregate demographic data to locate and correct problems concerning the inclusion of women, people of color, and older workers. *Id.* at 494–519.

Another important example is the approach taken by MIT to address problems of gender inequality identified in studies on the status of its women faculty. See *Reports of the Committees on the Status of Women Faculty*, at <http://web.mit.edu/faculty/reports> (2002). Steps were taken to seek out women for influential positions and to increase the number of female faculty members. *Id.* In addition, the school looked for explicit evidence of disparate treatment,

Similarly, several race- and sex-neutral practices that Linda Krieger has suggested might reduce intergroup bias involve decision making in the context of explicit fairness and antidiscrimination norms. For example, she suggests that employers carefully specify evaluative criteria and provide decision makers with a large amount of information on those criteria.<sup>47</sup> Studies show that when asked to make judgments about the characteristics associated with different classes of people, individuals are less likely to draw unfounded, stereotype-consistent associations "when they actually view, arrange, and make notes about the data from which judgments are to be made."<sup>48</sup> Another fairness practice that may prevent stereotyping from influencing decisions is requiring decision makers to "consider the opposite;" i.e., to make the case for the option they are not selecting, or to summarize the evidence tending to contradict their conclusions.<sup>49</sup> These approaches are also consistent with study results showing that people are less likely to activate stereotypes during periods in which they are kept "cognitively busy."<sup>50</sup> Studies have found that "white evaluators were less likely to deliver disproportionately harsh sanctions to black targets" when they believed that their actions would be reviewed closely.<sup>51</sup> Moreover, workplace practices consistent with norms such as equal consideration, fair and equal access and participation, professionalism, and respectful treatment can improve the workplace for all employees, which is also likely to reduce any backfire effect of the use of preferences.<sup>52</sup>

One recent study of the impact of policies or procedures for dealing with workplace sexual harassment concluded that both (1) "informational" methods, such as distributing an anti-harassment policy, and (2) more "proactive" methods, such as explicit complaint procedures and training programs, reduce workplace

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such as disparities in compensation. *Id.* Finally, there is an ongoing attempt to understand and solve the institutional nature of the problem by assessing the ways in which the criteria for evaluation, timing expectations, and conventions of authorship, for example, might disadvantage women over the course of a career. *Id.*

<sup>47</sup> *Categories*, *supra* note 21, at 1246; see KUNDA, *supra* note 23, at 351 (noting that stereotypes are less likely to affect impressions of an individual who is also known by individuating information).

<sup>48</sup> *Perestroika*, *supra* note 3, at 1329 (finding that stereotypes and other forms of bias will have less influence in the evaluation process when decision makers apply less generalized and more specific, preferably objective, criteria).

<sup>49</sup> *Id.* at 1329–30.

<sup>50</sup> KUNDA, *supra* note 23, at 336–40, 359–61; Blasi, *supra* note 26, at 1250.

<sup>51</sup> *Categories*, *supra* note 21, at 1246; see Sturm, *supra* note 25, at 519–22 (explaining that successful antidiscrimination programs often included ways of making those responsible account for results).

<sup>52</sup> KANTER, *supra* note 7, at 266 (the problem of equality for women cannot be solved without structures that potentially benefit all organization members more broadly); see also Green, *supra* note 17, at 147 (noting the safeguards that appear to minimize the likelihood of stereotyping).

sexual harassment, although proactive methods are much more effective. Women in workplaces with proactive strategies are less likely to be physically threatened or to be the targets of offensive sexual comments or questions.<sup>53</sup>

While the research on identifying ways of evaluating the success of particular interventions directed at minimizing bias is still fairly new,<sup>54</sup> a growing body of work suggests that employers could prevent some amount of discrimination in their workplaces by (1) increasing the number of employees from members of underrepresented groups through a selection process in which both qualifications and group membership are factors, (2) and creating systems for the evaluation of applicants and incumbents that would likely reduce the influence of stereotyping on those evaluations. A close look at the Supreme Court's pronouncements in its Title VII cases reveals room for such an holistic approach despite the statute's express prohibition on race and sex discrimination.

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<sup>53</sup> Gruber, *supra* note 19, at 316 (describing how the study results are consistent with earlier work suggesting that employee perceptions of organizational tolerance of sexual harassment, their beliefs about leader's stances on the problem, or their concerns about procedural justice rather than the mere objective existence of formal rules and regulations strongly and routinely influence their attitudes and behaviors on matters of sex discrimination and harassment).

<sup>54</sup> Sturm, *supra* note 25, at 547, 567–68 (explaining that the evidence suggests companies have made more progress developing structural approaches to promote gender rather than racial equity); see *Categories*, *supra* note 21, at 1244–47 (explaining that although social cognition theory suggests a prescriptive duty to identify and control for errors in social perception and judgment, creating an affirmative duty on employers to prevent discrimination is not justified because we do not “know enough about how to reduce cognition-based judgment errors to enable us to translate such a duty into workable legal rules”); Gruber, *supra* note 19, at 316–17 (explaining that the processes through which an organization's methods of addressing sexual harassment become sufficiently visible and credible have not been identified through research).

For contrasting views on the question whether the research in cognitive psychology suggests firms could devise effective programs to curb unconscious bias compare Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1158 (1999) (concluding the research shows that biases in judgment stemming from categorical generalizations cannot reliably be manipulated) with Michael Selmi, *Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233, 1239 (1999) (“[M]y sense is [that] the prospects of improvement by eradicating subtle discrimination are greater than the likelihood that the efforts will fail.”). Finally, for a critique of discrimination prevention efforts that consist solely of training programs decoupled from day-to-day organizational activity see Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1 (2001).

## B. Doctrinal Foundations of The Prevention Justification

### 1. The Supreme Court Has Consistently Stated That A Primary Purpose of Title VII is to Encourage Employers to Take Steps to Prevent Workplace Discrimination

In *Griggs v. Duke Power Co.*,<sup>55</sup> its first decision interpreting the statute, a unanimous Court established the disparate impact wing of Title VII jurisprudence. The Court wrote that “[t]he objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”<sup>56</sup> Just four years later, in *Albemarle Paper Co. v. Moody*,<sup>57</sup> the Court, again unanimously, wrote that this was the “primary” objective of Title VII, and it labeled that objective “prophylactic.”<sup>58</sup> It held that backpay should presumptively be awarded to prevailing Title VII plaintiffs because a backpay award is needed to provide a spur or catalyst to self-examination, self-evaluation, and elimination of the “last vestiges of an unfortunate and ignominious page in this country’s history.”<sup>59</sup> Backpay awards are also consistent, said the Court, with the compensatory purpose of Title VII—to make persons whole for injuries suffered because of employment discrimination.<sup>60</sup>

Throughout the 1970s and 1980s, the Court regularly referred to these twin purposes of Title VII (prophylactic and compensatory) and emphasized the importance of the prophylactic purpose. Occasionally, the Court referred to the prophylactic purpose as primary and the compensatory purpose as secondary. More often the Court did not rank the two purposes, but not once did any member of the Court describe the compensatory purpose as more important than the prophylactic purpose.<sup>61</sup>

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<sup>55</sup> 401 U.S. 424 (1971).

<sup>56</sup> *Id.* at 429–30.

<sup>57</sup> 422 U.S. 405 (1975).

<sup>58</sup> *Id.* at 417.

<sup>59</sup> *Id.* at 417–18.

<sup>60</sup> *Id.* at 418.

<sup>61</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264–65 (1989) (O’Connor, J., concurring) (stating that the “first” purpose of Title VII is to deter conduct harmful to society, and the “second” is to make persons whole for injuries suffered); *Johnson v. Transp. Agency*, 480 U.S. 616, 640 (1987) (stating that “[i]n evaluating the compliance of an affirmative action plan with Title VII’s prohibition on discrimination, we must be mindful of ‘this Court’s and Congress’ consistent emphasis on the value of voluntary efforts to further the objectives of the law”



The Court's emphasis on the importance of the prophylactic purpose actually increased after the 1991 amendments to Title VII permitting plaintiffs to recover compensatory and punitive damages. For example, in decisions in 1998 and 1999, the Court relied on the prophylactic purpose of Title VII to fashion defenses intended to encourage employers to take steps to prevent workplace discrimination.

In *Burlington Industries Inc. v. Ellerth*,<sup>62</sup> the Court created an employer affirmative defense to claims of supervisory sexual harassment in cases where the supervisor has not taken a tangible employment action against the plaintiff.<sup>63</sup> The defense is comprised of two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.<sup>64</sup> In a companion case, *Faragher v. City of Boca Raton*,<sup>65</sup> the Court explained that it created the defense because the primary objective of Title VII is "not to provide redress but to avoid harm."<sup>66</sup> "It would . . . implement clear statutory policy and complement the Government's Title VII enforcement efforts

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(quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290 (O'Connor, J., concurring)) (internal quotations omitted)); *Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986) (stating that "Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII"); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 230 (1982) (stating that Title VII's primary goal is to end discrimination and not to promote lawsuits; the "fall back" purpose is compensation); *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 364 (1977) (stating that a primary objective of Title VII is prophylactic—to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees—and an equally important purpose of the Act is to make persons whole for injuries suffered on account of unlawful employment discrimination); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (stating that "[c]ooperation and voluntary compliance were selected as the preferred means for achieving [Title VII's] goal"). *But cf.* *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 787–88 & n.6 (1976) (Powell, J. and Rehnquist, J., concurring in part and dissenting in part) (objecting that the majority's holding that competitive seniority should presumptively be granted to prevailing Title VII plaintiffs exalts the make-whole purpose of Title VII above the primary purpose—to eradicate discrimination).

<sup>62</sup> 524 U.S. 742 (1998).

<sup>63</sup> *Id.* at 761 (describing a tangible employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits").

<sup>64</sup> *Id.* at 765 ("While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.").

<sup>65</sup> 524 U.S. 775 (1998).

<sup>66</sup> *Id.* at 807. The Court in *Ellerth* also noted that the defense accommodated Title VII's policy of "encouraging forethought by employers." *Ellerth*, 524 U.S. at 764.

to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty."<sup>67</sup>

The next year, in *Kolstad v. American Dental Ass'n*,<sup>68</sup> the Court concluded that employers would not be liable for punitive damages for discriminatory employment decisions of managerial agents where those decisions "are contrary to the employer's 'good-faith efforts to comply with Title VII.'"<sup>69</sup> Otherwise, Justice O'Connor explained, an employer might be dissuaded from "implementing programs or policies to prevent discrimination in the workplace, [which would be] directly contrary to the purposes underlying Title VII. The statute's 'primary objective' is 'a prophylactic one'; it aims, chiefly, 'not to provide redress but to avoid harm.'"<sup>70</sup> Justice O'Connor specifically acknowledged the link to the Court's approach in *Faragher* and *Ellerth* and explained that the purposes of Title VII would be advanced by encouraging employers to create policies intended to prevent all forms of discrimination prohibited by Title VII, not just sexual harassment.<sup>71</sup>

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<sup>67</sup> *Faragher*, 524 U.S. at 806 (citing 29 C.F.R. § 1604.11(f) (1997) (advising employers to take all steps necessary to prevent workplace harassment)). Other EEOC regulations more generally encourage employers to take voluntary steps to prevent future discrimination without awaiting litigation and to act on a voluntary basis to modify employment practices and systems which constitute barriers to equal employment opportunity. 29 C.F.R. §§ 1608.1(b)(c) (2002).

Susan Sturm has concluded that the Court has imposed a legal obligation on employers to take steps to minimize the likelihood that their decision making processes will produce bias. Sturm, *supra* note 25, at 481, 489, 538, 542, 556 (exploring the possibility that *Faragher*, *Ellerth*, and *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) represent the Court's "structural" approach to workplace discrimination, in which the Court establishes a requirement that an employer take steps to prevent workplace discrimination without superimposing universal, formalistic solutions). For an assessment of the first seventy-two cases decided after *Faragher* and *Ellerth* see David Sherwyn et al., *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265 (2001) (concluding that the duty owed by employers did not change—that an employer exercises reasonable care when it has a harassment policy that is disseminated to all employees and that provides them an opportunity to report harassment to someone other than the harassing supervisor).

<sup>68</sup> 527 U.S. 526 (1999).

<sup>69</sup> *Id.* at 545 (citation omitted).

<sup>70</sup> *Id.* at 545 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998)).

<sup>71</sup> *Id.* Contrary to the findings of Sherwyn et al., *supra* note 67, with respect to the content of the *Faragher* and *Ellerth* affirmative defense, most courts have concluded that implementing a written or formal antidiscrimination policy is not sufficient to insulate an employer from a punitive damage award under *Kolstad*. See, e.g., *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174 (9th Cir. 2002) (taking affirmative steps to respond to and remedy complaints of discrimination is sufficient); *Green v. Adm'rs of Tulane Educ. Fund*, 284 F.3d 642 (5th Cir. 2002) (same); *Anderson v. G.D.C., Inc.*, 281 F.3d 452 (4th Cir. 2002) (posting EEOC poster is not sufficient);

*2. The Supreme Court Has Recognized the Role that Token Status, Conscious and Unconscious Stereotyping, and Subjective Decision Making Play in Causing Employment Discrimination*

Thus, we can see that the Court has spoken rather clearly for some time about an issue of great importance for the doctrinal viability of a prevention justification for affirmative action: Congress meant to encourage employers to take steps to prevent discrimination in their workplaces. But that begs the question, "what does the Court mean by discrimination?" Recent research, reviewed in Part II.A, suggests the term should be understood to include the impact of token status, unconscious stereotyping, and subjective decision making on minorities and women. On one hand, the Justices seem to conceive of disparate treatment discrimination as consisting of the intentional, conscious decisions of racists or sexists to treat minorities and women less favorably because of their race or sex.<sup>72</sup> However, there are other strands in the Court's Title VII jurisprudence that suggest the Court has a more comprehensive and nuanced understanding of the nature of discrimination.

For example, in *Watson v. Fort Worth Bank & Trust*, a unanimous court held that subjective or discretionary employment practices were subject to challenge under the Title VII disparate impact theory.<sup>73</sup> At issue in *Watson* was the common practice of making promotion decisions by relying on the subjective judgments of supervisors who were acquainted with the candidates and with the nature of the jobs to be filled.<sup>74</sup> Insulating such subjective employment practices from disparate impact analysis would be problematic, the Court explained, because even assuming that disparate treatment analysis would adequately police supervisors who exercised their discretion with discriminatory intent, "the problem of subconscious stereotypes and prejudices would remain."<sup>75</sup>

In *Price Waterhouse v. Hopkins*,<sup>76</sup> decided in the next term, the Justices were split on the value of testimony offered to explain how and why stereotypes operate. Ann Hopkins claimed that the accounting firm of Price Waterhouse refused to consider her for a partnership because of her sex. Dr. Susan Fiske, a social psychologist, offered testimony for Hopkins that the partnership selection

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Bruso v. United Airlines, Inc., 239 F.3d 848, 857–60 (7th Cir. 2001) (formal policy is not sufficient); Romano v. U-Haul Int'l, 233 F.3d 655, 668–69 (1st Cir. 2000) (must make good faith effort to comply).

<sup>72</sup> *Categories*, *supra* note 21, at 1171–72; *Perestroika*, *supra* note 3, at 1298–302; Linda Hamilton Krieger, *Naturalizing Disparate Treatment Doctrine: Why So Little Progress in the Courts?* (2002) (unpublished manuscript, on file with author).

<sup>73</sup> 487 U.S. 977, 991 (1988).

<sup>74</sup> *Id.* at 982.

<sup>75</sup> *Id.* at 990 (emphasis added).

<sup>76</sup> 490 U.S. 228 (1989).

process, which relied to a large extent on evaluations of candidates rendered by the firm's partners, was likely influenced by sex stereotyping. As the plurality explained, "[a]ccording to Fiske, Hopkins' uniqueness (as the only woman in the pool of [88] candidates) and the subjectivity of the evaluations made it likely that sharply critical remarks [from partners who knew her only slightly] . . . were the product of sex stereotyping . . . ." <sup>77</sup> The district court relied in part on that testimony in finding for Hopkins. <sup>78</sup>

Because Price Waterhouse waived the objection at trial, the plurality rejected the argument that the district court erred in relying on Fiske's testimony. But Justice Brennan defended the district court's reliance on Fiske's testimony in a more substantive way. He explained that he did not accept either the defendant's characterization of the testimony as "unsubstantiated" and "intuitively divined" or the dissent's "dismissive attitude toward Dr. Fiske's field of study and toward her own professional integrity." <sup>79</sup> Despite the absence of a holding on the subject, some lower courts have read *Price Waterhouse* as permitting expert testimony on the role of token status and subjective decision making in stereotyping. <sup>80</sup>

Surely even more ambiguously, in 2001 Justice Kennedy, who was quite critical of Dr. Fiske's testimony in *Price Waterhouse*, joined with Justice O'Connor to explain their understanding of the role that "instinct" may play in employment discrimination. The Justices concurred in *Board of Trustees of the University of Alabama v. Garrett*, where the Court held that the 11th Amendment barred actions against states for money damages in federal court brought under Title I of the Americans with Disabilities Act. <sup>81</sup> In their concurrence Justices Kennedy and O'Connor acknowledged the importance of the ADA as a force for change in the treatment of persons with disabilities. They wrote:

Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. *It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves.* . . . [The law

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<sup>77</sup> *Id.* at 235–36.

<sup>78</sup> *Id.* at 236–37.

<sup>79</sup> *Id.* at 255 (citations omitted). Indeed, Justices Kennedy, Rehnquist, and Scalia were quite skeptical of Fiske's approach and conclusion. They criticized Fiske because she "purported to discern stereotyping in comments that were gender neutral . . . without any knowledge of the comments' basis in reality and without having met the speaker or subject" and insisted that the Court's opinions should not be read as requiring factfinders to credit testimony based on this type of analysis." *Id.* at 293 n.5 (referring derisively to Fiske's characterization of the stereotyping as "unconscious").

<sup>80</sup> See, e.g., *Jensvold v. Shalala*, 925 F. Supp. 1109, 1114 (D. Md. 1996); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 864 n.34 (D. Minn. 1993); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1502 (M.D. Fla. 1991).

<sup>81</sup> 531 U.S. 356, 360 (2001).

can and does give citizens] an incentive, flowing from a legal duty, to develop a better understanding, a more decent perspective, for accepting persons . . . into the larger society. The law works this way because the law can be a teacher.<sup>82</sup>

And finally, just last term in *Grutter v. Bollinger*,<sup>83</sup> Justices Ginsburg and Breyer, concurring, wrote that it was “well documented that . . . unconscious race bias . . . remain[s] alive in our land, impeding realization of our highest values and ideals.”<sup>84</sup>

Thus, it is a fair reading of the Court’s relevant decisions that the purpose of Title VII is to encourage employers to take steps to prevent discrimination in the workplace, including discrimination that is the product of unconscious and automatic bias and stereotyping. Moreover, the Court has created liability rules to give employers incentives to take these steps. Under the Court’s Title VII affirmative action jurisprudence, employers are permitted to grant race or sex-based preferences if they do so pursuant to a plan that is consistent with the purposes of Title VII. An affirmative action plan intended to prevent workplace discrimination would seem to satisfy this doctrinal requirement.<sup>85</sup>

### 3. The Supreme Court’s Title VII Affirmative Action Jurisprudence

The Court has decided only two cases presenting the question whether Title VII permits an employer to make race- or sex-conscious employment decisions pursuant to a voluntary affirmative action plan. In both *United Steelworkers v. Weber*<sup>86</sup> and *Johnson v. Transportation Agency*<sup>87</sup> the Court determined the employer’s conduct was lawful.<sup>88</sup> The plans were deemed lawful because

<sup>82</sup> *Id.* at 374–75 (emphasis added).

<sup>83</sup> 123 S. Ct. 2325 (2003).

<sup>84</sup> *Id.* at 2347–48.

<sup>85</sup> According to several commentators, this approach would also be consistent with the original understanding of voluntary affirmative action, which referred to measures intended to prevent discrimination. See RESKIN, *supra* note 39, at 5–18 (defining affirmative action as actions, policies and procedures designed to combat discrimination in the workplace by replacing employment practices that are discriminatory with employment practices that safeguard against discrimination); William W. Van Alstyne, *Affirmative Actions*, 46 WAYNE L. REV. 1517, 1527–30, 1564 n.9 (2000) (explaining that the use of the phrase in Executive Order 11246 required federal contractors to take “precautionary and preventive measures . . . to prevent discrimination . . . within the practices and policies of those benefiting from federal contract work”); *Perestroika*, *supra* note 3, at 1255 n.11 (citing U.S. Commission on Civil Rights, *Statement on Affirmative Action* (Report No. 54, 1977)).

<sup>86</sup> 443 U.S. 193 (1979).

<sup>87</sup> 480 U.S. 616 (1987).

<sup>88</sup> *Weber*, 443 U.S. at 197; *Johnson*, 480 U.S. at 620. I have previously discussed these cases at length in the context of an exploration of their application to affirmative action plans

(1) they were consistent with the purposes of Title VII, and (2) they operated without causing undue harm to the rights of nonminority employees. Given that encouraging employers to prevent discrimination is a primary purpose of Title VII, an affirmative action plan intended to prevent workplace discrimination would seem to satisfy the first requirement for a permissible affirmative action plan set forth by the Court in *Weber* and *Johnson*.

In *Weber*, the Court approved an affirmative action plan that reserved 50% of the openings in an in-plant craft-training program for black employees until the percentage of black craftworkers in the plant approximated the percentage of blacks in the local labor force.<sup>89</sup> Only 1.83% of the skilled craftworkers at the plant were black, and the work force in the area was approximately 39% black.<sup>90</sup> The Court noted that the employer had for years hired as craftworkers only those who had prior craft experience, knowing that blacks had long been excluded from craft unions and could not get that experience.<sup>91</sup> The Court found that a plan designed "to eliminate conspicuous racial imbalance in traditionally segregated job categories"<sup>92</sup> was permissible, so long as it did not "unnecessarily trammel the interests of the white employees,"<sup>93</sup> because the plan was consistent with one goal Congress designed Title VII to achieve—breaking down old patterns of racial segregation and hierarchy.<sup>94</sup>

The Court in *Johnson*, explaining that it was "guided" by *Weber*, declared lawful an affirmative action plan created by the employer to redress an underrepresentation of women in its workforce.<sup>95</sup> Pursuant to the plan the employer promoted a female employee, in part because of her gender, rather than a similarly qualified male employee.<sup>96</sup> The employer had created the affirmative action plan in response to its finding that women constituted 36.4% of the relevant labor pool but 22.4% of its work force, and there were no women among the 238 employees in the job classification that covered the position to which the female applicant was promoted.<sup>97</sup> But there was no evidence, unlike *Weber*, that

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seeking "diversity" in employment. See Michael J. Yelnosky, *Whither Weber?*, 4 ROGER WILLIAMS U. L. REV. 257 (1998).

<sup>89</sup> *Weber*, 443 U.S. 193.

<sup>90</sup> *Id.* at 198–99.

<sup>91</sup> *Id.* at 198 & 198 n.1.

<sup>92</sup> *Weber*, 443 U.S. at 209.

<sup>93</sup> *Id.* at 208 (explaining that the plan passed that test because: (1) it did not "require the discharge of white workers and their replacement with new black hires;" (2) it did not create "an absolute bar to the advancement of white employees;" and (3) it was intended to eliminate the existing racial imbalance and not maintain balance thereafter).

<sup>94</sup> *Id.*

<sup>95</sup> *Johnson*, 480 U.S. at 641–42.

<sup>96</sup> *Id.* at 619.

<sup>97</sup> *Id.* at 620–21.

the employer or a union with whom the employer contracted had been intentionally discriminating against women.<sup>98</sup>

The Court nevertheless found the employer's conduct lawful because the employer was animated by "concerns similar to those of the employer in *Weber*."<sup>99</sup> Considering the sex of the applicants for the position was justified by a "'manifest imbalance' that reflected underrepresentation of women in 'traditionally segregated job categories.'"<sup>100</sup> The majority explained that this "requirement . . . provides assurance . . . that sex . . . will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination."<sup>101</sup> Then, as in *Weber*, the Court concluded that the plan did not unnecessarily trammel the rights of male employees or create an absolute bar to their advancement.<sup>102</sup>

The Court in *Weber* stated that it was not "defin[ing] in detail the line of demarcation between permissible and impermissible affirmative action plans,"<sup>103</sup> and the majority in *Johnson* similarly did "not establish the permissible outer limits of voluntary programs undertaken by employers to benefit disadvantaged groups."<sup>104</sup> In both cases the Court concluded the employer's conduct was permissible because the purpose of the plans they had created "mirror[ed] those of the statute."<sup>105</sup> While the Court in *Weber* and *Johnson* found that one of those purposes is eliminating the effects of workplace discrimination,<sup>106</sup> the primary

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<sup>98</sup> Justice O'Connor made this distinction explicit in her concurrence, when she explained that in *Weber*, "[t]here was little doubt that the absence of black craftworkers was the result of the exclusion of blacks from craft unions[.]" but that in *Johnson* "the evidence of past discrimination is more complex" because although there were no women employed as skilled craftworkers, the number of women with the qualifications for entry into the relevant job classification was quite small. *Johnson*, 480 U.S. at 651-52 (O'Connor J., concurring).

<sup>99</sup> *Id.* at 631.

<sup>100</sup> *Id.* (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 197 (1979)).

<sup>101</sup> *Id.* at 632.

<sup>102</sup> *Id.* at 637-39 (explaining that: (1) the plan required women to compete with all other qualified applicants for promotion; (2) the plaintiff had no entitlement to the position he sought, retained his own position, and remained eligible for other promotions; and (3) the plan was intended to attain and not maintain a balanced work force).

<sup>103</sup> *Weber*, 443 U.S. at 208.

<sup>104</sup> *Johnson*, 480 U.S. at 642 (Stevens, J., concurring).

<sup>105</sup> *Weber*, 443 U.S. at 208; see also *Johnson*, 480 U.S. at 630 (characterizing *Weber* as standing for the proposition that Title VII permits "voluntary employer action . . . furthering Title VII's purpose of eliminating the effects of discrimination in the workplace").

<sup>106</sup> *Johnson*, 480 U.S. at 630. In his *Johnson* concurrence, Justice Stevens wrote that in many cases an employer will find it more appropriate to consider other legitimate reasons to give preferences to members of underrepresented groups. *Id.* at 646-47 (Stevens, J., concurring) (quoting Kathleen Sullivan, *The Supreme Court—Comment, Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 96 (1986) (explaining that an employer's appropriate "forward-looking considerations" might include,

purpose of Title VII, as we have seen, is to encourage employers to prevent discrimination in their workplaces.<sup>107</sup> An affirmative action plan intended to prevent discrimination would mirror that purpose of the statute.

### III. THE PREVENTION JUSTIFICATION IS EASIER TO RECONCILE WITH THE PURPOSE OF TITLE VII THAN THE REMEDIAL AND DIVERSITY JUSTIFICATIONS

This tight fit between the purpose of Title VII and an affirmative action program to prevent discrimination is remarkable, given the difficulty reconciling the purposes of Title VII with the affirmative action plans deemed lawful in *Weber* and *Johnson* and the difficulty encountered by proponents of a diversity justification for affirmative action in employment. Much of what I have to say here is not entirely new, but these critiques of the remedial and diversity justifications for affirmative action in employment offer a lens through which to view the prevention justification, one that helps bring into even sharper focus its apparent consistency with the purpose of Title VII.

#### *A. Remedial Justifications for Affirmative Action in Employment*

A reasonable person could, I think, read *Weber* as a case in which the Court set forth the contours of a permissible “remedial” affirmative action plan and *Johnson* as an application of *Weber* in a less explicitly remedial context.<sup>108</sup> However, in Part II.B. I tried to show that the Court did not limit permissible affirmative action plans under Title VII to those with a remedial purpose and that an affirmative action plan intended to prevent discrimination would also be consistent with the purpose of Title VII.

My point in this Part is different. Here I want to explain that it would be problematic to read *Weber* and *Johnson* to privilege voluntary remedial affirmative action in employment because the plans at issue in those cases were only loosely remedial. In *Weber* and *Johnson*, the employers engaged in race- and sex-conscious decision making in response to underrepresentation, respectively, of blacks and women in their workforces. The Court found that both plans were thus consistent with Title VII’s purpose of eliminating the effects of

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among others, improving the quality of the services it provides or increasing the diversity of its workforce)).

<sup>107</sup> See *supra* Part II.B.1.

<sup>108</sup> Some courts have held that the Court in *Weber* and *Johnson* meant to limit the Title VII affirmative action exception to “remedial” plans. See, e.g., *Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1550, 1556 (3d Cir. 1996). I have explained elsewhere that there are several reasons a court might come to that conclusion. See Yelnosky, *supra* note 88.



discrimination, but neither plan fit comfortably within a paradigm of corrective justice.

The focus in that paradigm is on the conduct of an identifiable wrongdoer.<sup>109</sup> By contrast, while the Court in *Weber* referred to the fact that the employer knew that because of racial discrimination by the relevant union, hiring only experienced skilled craft workers would result in an essentially all-white craft workforce, the Court did not condition the legality of an employer's affirmative action plan on the employer's past discrimination.<sup>110</sup> In *Johnson*, the Court did not suggest that the employer was permitted to use gender as a factor in filling the road dispatcher position because the employer had discriminated against women in filling those positions in the past.

Even if the "manifest imbalance" required by the Court as a condition of affirmative action in those cases could be seen as a reliable proxy for past discrimination by the employer,<sup>111</sup> permitting voluntary affirmative action as a "remedy" for that discrimination allows the employer to avoid paying the penalty for discrimination that would be imposed by Title VII.<sup>112</sup> The costs of remedying any past discrimination are borne not by the employer, but by the currently disfavored employee or applicant, who was certainly not a wrongdoer and likely not a beneficiary of past employment discrimination.<sup>113</sup> Finally, the affirmative action programs permitted in *Weber* and *Johnson* did not compensate past victims of discrimination—at least not by design.<sup>114</sup>

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<sup>109</sup> See Brest & Oshige, *supra* note 6, at 865–66; see also Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 403 (1998); Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 92 (1986).

<sup>110</sup> *Johnson*, 480 U.S. at 633 n.10 (stating that if the Court in *Weber* had been concerned with past discrimination by the employer, it would have focused on discrimination in hiring skilled, not unskilled workers, because only the scarcity of the former in the employer's work force would have made it vulnerable to a Title VII suit—the relevant comparison would have been between the percentage of black skilled workers in the employer's work force and the percentage of black skilled craft workers in the area labor market).

<sup>111</sup> But see *Johnson*, 480 U.S. at 630 n.8 (explaining that requiring an employer to show that its discrimination created the manifest imbalance "would create a significant disincentive for voluntary action"); see also *Weber*, 443 U.S. at 194–95.

<sup>112</sup> Liu, *supra* note 109, at 402; Sullivan, *supra* note 109, at 94.

<sup>113</sup> Brest & Oshige, *supra* note 6, at 866; Liu, *supra* note 109, at 402; Sullivan, *supra* note 109, at 94.

<sup>114</sup> See *Weber*, 443 U.S. at 211 (Blackmun, J., concurring) (stating that the Kaiser program permitted the employer to avoid identifying victims of past discrimination); Brest & Oshige, *supra* note 6, at 866 (summarizing the three ways in which voluntary remedial affirmative action often departs from the paradigm of corrective justice); Liu, *supra* note 109, at 402 n.110 (stating that the beneficiary of a remedial affirmative action program need not be an actual victim of discrimination); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619 (1991).

Judge Posner, focusing on these features of voluntary "remedial" affirmative action programs in employment, concluded that it would not be logical for the goal of remedying past discrimination to have priority over other legitimate goals a racial preference might serve.<sup>115</sup> While I agree with Justice Blackmun's analysis that the *Weber* Court's approach was a practical and equitable response to the problem of work force segregation,<sup>116</sup> it is not the only such approach, and the steps authorized by *Weber* and *Johnson* seem awkward if they are viewed as "compensatory" or "remedial."<sup>117</sup>

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(explaining that compensatory justice in this context requires something impossible—determining the extent to which individual members of minority groups have been injured by past wrongs); Sullivan, *supra* note 109 at 95–96 (explaining that the Court is not being faithful to a remedial paradigm in its affirmative action cases, but is engaging instead in a utilitarian balancing of hardships).

<sup>115</sup> Wittmer v. Peters, 87 F.3d 916, 921 (7th Cir. 1996) (ruling that a state actor could, consistent with the equal protection clause, prefer a black applicant for a position as drill sergeant in a penal boot camp based on expert opinion that black inmates would more likely be rehabilitated than if a white man was in the position). I agree with Judge Posner's basic point about remedial affirmative action programs in employment, and thus, I disagree with Cynthia Estlund that many of the objections to affirmative action have little force against affirmative action plans that are remedial in nature, Estlund, *supra* note 32, at 93–94, if she has in mind the kind of plan deemed lawful in *Johnson*.

<sup>116</sup> *Weber*, 443 U.S. at 209–16 (Blackmun, J., concurring).

<sup>117</sup> Ian Ayres and Fredrick Vars have shown how the Supreme Court's equal protection cases can be read to permit the government to use affirmative action in procurement to remedy the effects of private discrimination it has not caused. See Ian Ayres & Fredrick Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577, 1611 (1998) (exploring the ramifications of the Supreme Court's acknowledgment in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491–92 (1989) that the government "has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction").

They further assert that upon a showing that both the government and private firms compete for a certain group of employees, the government should be able to favor minority employees to counteract the effects of private hiring discrimination. *Id.* at 1635. They hypothesize that where there is discrimination in the relevant private employment market, the beneficiaries of a government affirmative action program in the same market were likely victims of that private discrimination, and the disfavored applicants for government jobs are advantaged unjustly in their job search in the private market. *Id.* at 1635–38.

This remedial approach to affirmative action in the employment context is not entirely satisfying because there is no way of knowing whether any *particular individual* was a victim or beneficiary of discrimination in the private employment market. It may be easier to tolerate this loose fit in the procurement context where it is more likely that any particular firm among a relative few operating in a discriminatory market will have been benefited or harmed in some way at some point by discrimination in that market. In a labor market, by contrast, where a larger number of participants interact with a larger number of employers, assuming discrimination operates against or in favor of all market participants is less reasonable.

Moreover, this approach to affirmative action in employment may justify only government affirmative action. Private employers, by contrast, have no resonant authority to remedy the

### B. Diversity Justifications for Affirmative Action

The most popular iteration of the diversity justification for affirmative action in employment is based on the assertion that there are competitive or operational advantages to increasing the numbers of women and minorities in a relatively homogenous work force. For some employers it is almost an axiom that "our diversity is our strength."<sup>118</sup> The operating assumption tends to be that racial, ethnic, and gender diversity is a proxy for a diversity of opinions, experiences, ideas, and beliefs that can contribute to enhanced workplace performance.<sup>119</sup>

This justification for race- or sex-based preferences faces special and perhaps insurmountable doctrinal obstacles. In Title VII, Congress specifically determined that race discrimination in employment was unlawful even if an employer could show that discrimination furthered its operational goals, such as producing better products or providing better services to its customers. Under section 703(e)(1), an employer can engage in intentional discrimination "on the basis of . . . religion,

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discrimination of other private employers. That a government employer might have more leeway to engage in affirmative action than a private employer might explain the difference in the Court's approaches in *Weber* and *Johnson*. In the latter case, which involved a public employer, there was less justification for the Court to conclude that the employer itself had previously discriminated. However, *Weber* might be read as consistent with an argument that the approach suggested by Ayres and Vars need not be limited to public employers. In *Weber*, recall, a private employer was arguably permitted to engage in affirmative action to remedy discrimination by another private actor in the same labor market—the union.

<sup>118</sup> Ann C. McGinley & Michael J. Yelnosky, *Board of Education v. Taxman: The Unpublished Opinions*, 4 ROGER WILLIAMS U.L. REV. 205, 206 (1998). For example, IBM's vice-president of global work force diversity once explained that the company's view of increasing job opportunities for women and minorities is based not on a "moral imperative," but rather a "strategic imperative" because diversity is inextricably linked to the success of the business. *Id.* at 206–07.

<sup>119</sup> See, e.g., Estlund, *supra* note 32, at 83. There are, however, several distinct justifications that are or could be labeled "diversity" justifications for affirmative action in employment. For example, in *Taxman v. Board of Education*, 91 F.3d 1547 (3d Cir. 1996), *cert. dismissed*, 522 U.S. 1010 (1997), where a school district reducing force retained one of two similarly situated teachers because she was black and her counterpart was white, several "diversity" arguments were made in support of the decision. The school board argued that a more racially diverse teacher work force: (1) reduced the risk that teachers or administrators would discriminate against minority students; (2) promoted understanding and tolerance among students, see *Whither Weber?*, *supra* note 88, at 277, and; (3) promoted a more enriching educational environment for students. Ann C. McGinley, *Affirmative Action Awash in Confusion: Backward-Looking-Future-Oriented Justifications for Race-Conscious Measures*, 4 ROGER WILLIAMS U.L. REV. 209, 241 (1998).

Of course, the Supreme Court recently ruled that student body diversity and the educational benefits it brings are a compelling state interest that can justify the use of race in university admissions. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2347 (2003). One of the important questions unanswered by *Grutter* is whether its reasoning would permit the use of affirmative action in faculty hiring.

*sex, or national origin* in those certain instances where *religion, sex, or national origin* is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”<sup>120</sup> The omission of race from this bona fide occupational qualification defense (BFOQ) was intentional.<sup>121</sup>

Even assuming that there is an implied “necessity exception” to the exclusion of race as a possible BFOQ, as some have suggested,<sup>122</sup> or instead that an employer seeks to justify a gender, rather than a race-based employment decision on the ground that it improves operations, the BFOQ is “written narrowly, and th[e] Court has read it narrowly.”<sup>123</sup> An employer would be required under the Court’s precedents to show, for example, that being a woman would “affect an employee’s ability to do the job,”<sup>124</sup> and under the cases interpreting Title VII,

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<sup>120</sup> 42 U.S.C. § 2000e-2(e)(1) (2000) (emphasis added).

<sup>121</sup> See *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 473 (11th Cir. 1999); *Patrolmen’s Benevolent Ass’n v. City of New York*, 74 F. Supp. 2d 321, 337 (S.D.N.Y. 1999); Kingsley R. Browne, *Nonremedial Justifications for Affirmative Action in Employment: A Critique of the Justice Department Position*, 12 LAB. LAW. 451, 467 (1997); Deborah C. Malamud, *Values, Symbols, and Facts in the Affirmative Action Debate*, 95 MICH. L. REV. 1668, 1708 (1997) (“Title VII . . . made . . . [an] explicitly colorblind stand against race as a bona fide occupational qualification . . .”) (reviewing K. ANTHONY APPIAH & AMY GUTTMAN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* (1996); CHRISTOPHER EDLEY JR., *NOT ALL BLACK & WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES* (1996); RICHARD D. KAHLBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996); and JOHN DAVID SKRETNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* (1996)).

The inclusion of sex in the BFOQ and the exclusion of race might give employers more freedom to take affirmative steps to favor women than blacks. This aspect of the Court’s equal protection jurisprudence was criticized by Justice Stevens in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), where the Court held that all government race-based preferences were subject to strict scrutiny. Justice Stevens wrote that using strict scrutiny to test the legality of benign race-based classifications and intermediate-level scrutiny for sex-based classifications might give governments more freedom to favor women than racial minorities. *Id.* at 247 (Stevens, J., dissenting).

<sup>122</sup> See, e.g., MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* 284 (1988).

<sup>123</sup> *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991).

<sup>124</sup> *Id.* That the Court did not refer to the BFOQ defense in *Weber* or *Johnson* is not proof that it is irrelevant to the lawfulness of affirmative action plans under Title VII. In neither case did the employer seek to justify its use of race or gender on operational grounds. The BFOQ defense most obviously applies where the employer’s justification is operational—where the employer contends that selecting employees based on gender, for example, is “reasonably necessary to the normal operation of that particular business.” 42 U.S.C. § 2000e-2(e)(1) (emphasis added).

customer or co-worker preference for a woman would not ordinarily be a justification for discrimination otherwise prohibited by the statute.<sup>125</sup>

But the standard diversity justification is about more than customer or co-worker preference for employees of a particular race or sex;<sup>126</sup> it is based on the assertion that demographic diversity will improve the employer's products or services. However, "a utilitarian justification lends itself to a utilitarian critique,"<sup>127</sup> and many "employers would be hard-pressed—if pressed beyond platitudes—to demonstrate the instrumental benefits of [demographic] diversity within their operations."<sup>128</sup> To the contrary, demographic homogeneity may be more operationally efficient, particularly to the extent that a job requires the

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<sup>125</sup> See Malamud, *supra* note 121, at 1708; Strauss, *supra* note 114, at 1623. I say "not ordinarily" because the Court has not ruled out the possibility of endorsing a privacy-based BFOQ. *Johnson Controls*, 499 U.S. at 206 n.4.

<sup>126</sup> However, one popular version of the diversity justification would implicate the general prohibition on customer preference as a defense to otherwise unlawful discrimination. For example, a firm might argue that demographic diversity in sales and marketing positions might legitimize a firm's products or services with a heterogeneous client base. See, e.g., Malamud, *supra* note 1, at 954.

<sup>127</sup> Malamud, *supra* note 121, at 1709.

<sup>128</sup> Estlund, *supra* note 32, at 83–84. For example, in jobs where technical skills or physical ability are most important, the connection between demographic diversity and improved performance may not be demonstrable. Even where the connection may be demonstrated—there is evidence, for example, that diverse work groups may generate a broader range of ideas and alternatives—demographic diversity is also associated with friction, absenteeism, turnover, dissatisfaction, reduced commitment to the job, and lower productivity. *Id.* at 84; see also KANTER, *supra* note 7, at 222 (explaining that people with incongruent status, like women in male jobs, strain group interaction by generating ambiguity and lack of social certitude); Wilkins & Gulati, *supra* note 17, at 596–97 (contrasting the diversity justification in the context of companies that sell consumer products with the same justification asserted by a law firm). But see Linda Barrington & Kenneth Troske, *Workforce Diversity and Productivity: An Analysis of Employer-Employee Matched Data* (July, 2001) (concluding that in a study of firms diversity was either positively correlated with productivity or there was no significant relationship between diversity and productivity). See generally Orlando C. Richard et al., *The Impact of Visible Diversity on Organizational Effectiveness: Disclosing the Contents in Pandora's Box*, 8 J. BUS. & MGMT. 1 (2002).

In *Grutter*, the Supreme Court found that the Michigan Law School had a compelling interest in attaining a diverse student body, but the Court explained that it gave special deference to the law school's judgment because "given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 123 S. Ct. 2325, 2339 (2003). Of course, no such deference is due American business under Title VII. However, it is worth noting that the Court concluded that the educational benefits that the Law School sought through racial diversity in the class were "not theoretical but real" because major American businesses filed an amicus brief in which they asserted that the skills needed in today's global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. *Id.* at 2340.

exercise of personal discretion, because the firm may choose to rely on the trust that comes from “‘homosocial reproduction’—selection of incumbents on the basis of social similarity.”<sup>129</sup> It would be difficult to read Title VII to permit employers to make race-conscious employment decisions to further operational goals only when those goals can be attained by “diversifying” rather than “homogenizing” the work force.<sup>130</sup>

Even if an employer could show that there are operational benefits to assembling a group of workers with different opinions, experiences, ideas, and beliefs, it would have to show that racial or gender diversity is an accurate proxy for the desired viewpoint diversity. However, “[t]he more individualized the employment decision, the more possible and sensible it may seem to make individualized inquiries into the actual experiences and attitudes of the applicant.”<sup>131</sup> In the framework of the Court’s BFOQ doctrine, an employer would have to show not only that diversity of opinions, ideas, beliefs, or attitudes among the members of the work force relates to the “essence” or the “central mission of the employer’s business,”<sup>132</sup> but also that (1) the employer had a “factual basis” for believing that all or substantially all women or blacks, for example, had certain opinions, ideas, beliefs, or attitudes not sufficiently represented in the current work force complement, or (2) that it was “impossible or highly impractical to deal with the . . . employees on an individualized basis.”<sup>133</sup> Absent this showing, a diversity-based affirmative action program would not likely survive Title VII scrutiny and would instead appear to be no more than the use (perhaps well-intentioned) of a stereotype about the relationship between gender or race and certain attitudes, which Congress meant in Title VII to make unlawful when used as the basis for making employment decisions.<sup>134</sup>

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<sup>129</sup> KANTER, *supra* note 7, at 54; see Devon W. Carbado & Mitu Gulati, Homogeneity (2002) (unpublished manuscript, on file with author) (exploring the ways in which managers, seeking to produce trust, fairness, and loyalty in the workplace will have a tendency to organize homogeneous work teams); Carbado & Gulati, *supra* note 40, at 1795–97 (same); Estlund, *supra* note 31, at 27–28, 83–84.

<sup>130</sup> See Malamud, *supra* note 1, at 964. Professor Malamud has also pointed out that the utilitarian quality of the diversity justification might justify limiting the employment opportunities of blacks, for example, to those that involve serving an African-American customer base. *Id.* at 962 (distinguishing between black social workers and black physicists). See also Ferrill v. Parker Group, Inc., 168 F.3d 468 (11th Cir. 1999); Patrolmen’s Benevolent Ass’n v. City of New York, 74 F. Supp. 2d 321 (S.D.N.Y. 1999); *Whither Weber?*, *supra* note 88, at 280 (mock opinion for the Court affirming the Third Circuit in *Taxman*).

<sup>131</sup> Estlund, *supra* note 32, at 83.

<sup>132</sup> *Automobile Workers v. Johnson Controls Inc.*, 499 U.S. 187, 203 (1991).

<sup>133</sup> See *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412–17 (1985).

<sup>134</sup> See Estlund, *supra* note 32, at 83 n.347 (explaining that this is “just the sort of stereotyping that undermines . . . understanding and communication”); *Perestroika*, *supra* note 3, at 1267 (explaining that diversity claims tend to reinforce the essentialism inherent in an undifferentiated monolithic category).

*C. Estlund's "Integration Justification" for Affirmative Action*

I would be remiss if I did not discuss in some detail Cynthia Estlund's "integration justification" for affirmative action.<sup>135</sup> Exploring its relationship to my prevention justification as well as explaining why I have concluded that her approach is less consistent with Title VII's purposes and doctrine helps further etch the contours of my argument.

Professor Estlund's views on the subject of affirmative action in employment are part of a larger project in which she makes the case for recognizing the workplace as an institution in which ties that are necessary to sustain a diverse democratic society can form across lines of racial and ethnic identity. Her integration thesis would support "efforts to bring about more-than-token minority [or female] representation in workplaces that are overwhelmingly white [or male]."<sup>136</sup> She distinguishes her integration justification from the diversity justification on the ground that the integration argument is based not on differences between members of different racial groups and the relevance of those differences to enhancement of an employer's products or services, but on commonality and connectedness—on cultivating empathy, understanding, and friendship among citizens on opposite sides of our society's racial and ethnic divides.<sup>137</sup>

Estlund thus argues that selecting employees based on group membership is justifiable because group membership is not used as a proxy for relevant difference but because "group membership itself often triggers stereotypes, bias, aversion, and suspicion, and has often been the basis for segregation and discrimination."<sup>138</sup> In pointing out the role that workplace integration could play in breaking down stereotypes, Professor Estlund hints at, but does not develop, what I am now referring to as the prevention justification for affirmative action. She has a more ambitious claim about the benefits of workplace integration: She claims that workplace integration will lead to a healthier democracy.<sup>139</sup> My claim, by contrast, is that it would help reduce workplace discrimination.

Estlund's integration argument is based on diffuse benefits that accrue to the society as a whole in the form of a healthier, more functional democracy.<sup>140</sup> As she acknowledges, these benefits are difficult to demonstrate and government

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<sup>135</sup> See Estlund, *supra* note 32, at 78–94.

<sup>136</sup> *Id.* at 79 n.333.

<sup>137</sup> *Id.* at 81–84.

<sup>138</sup> *Id.* at 83. Group membership is similarly relevant under my prevention justification without the use of that membership as a proxy for certain attitudinal characteristics of group members.

<sup>139</sup> See Estlund, *supra* note 32, at 77 (noting that individuals working together in relatively heterogeneous workplaces form ties that help "to sustain a diverse democratic society").

<sup>140</sup> *Id.* at 84–86.

rather than private employers are in a better position to assert an interest in pursuing them.<sup>141</sup> To be fair, the benefits claimed by the prevention justification will also be quite difficult to measure, but employer steps to prevent discrimination in the workplace were specifically encouraged by Congress in Title VII, and the Court has, as we have seen, read the statute with that goal in mind. Private and government employers alike are well situated to assert an interest in obtaining those benefits. Thus, the prevention justification fares better than the integration justification in light of the existing statutory framework in which America's employers operate.<sup>142</sup>

While the claims I make in support of the prevention justification are most consistent with the purposes of Title VII, the fit between the prevention justification and Title VII affirmative action doctrine is not seamless. It is to these special doctrinal challenges that I now turn.

#### IV. "STRETCHING" EXISTING DOCTRINE

To this point, I have tried to show that an employer could prevent some workplace discrimination against blacks and women by implementing a program pursuant to which it, in part, took race and sex into account to increase the representation of blacks and women in the work force. I have shown that the Supreme Court's Title VII cases leave room for such an approach because the primary purpose of Title VII as articulated by the Court is to encourage employers to take steps to prevent workplace discrimination, and one requirement of a lawful affirmative action plan under Title VII is that it be consistent with the

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<sup>141</sup> *Id.* at 86, 92–93. I suggest, *supra* note 117, that the remedial justification for affirmative action offered by Ayres and Vars is similarly limited to government employers.

<sup>142</sup> If Professor Estlund is correct about the role of the workplace in a diverse democracy, as I believe she is, some of the benefits of integration she describes would flow from the use of discrimination prevention programs like the ones I contemplate here, but the benefits would be a side effect of the efforts aimed at preventing workplace discrimination.

While, on the one hand, Estlund's justification for affirmative action is more ambitious than the prevention justification, she does not advocate a change in current judicial interpretation of what Title VII permits in the way of affirmative action. She concludes that an employer could pursue the benefits of integration that she describes in the face of the manifest imbalance required by *Weber* and *Johnson*, and that the other limits imposed by those cases are consistent with her thesis because they mark, in some way, the boundary between preferences that are consistent with constructive interaction within the workforce and those that are too large or rigid. She ultimately concludes that the integration argument may operate most sensibly one step removed from legal doctrine. See Estlund, *supra* note 32, at 88–93; see also *Whither Weber?*, *supra* note 88, at 281 (mock opinion for the Court in *Taxman* suggesting that the existence of a manifest imbalance in a traditionally segregated job category might serve as a justification for a diversity-based affirmative action program under *Weber* and *Johnson*).

For an argument similar to Estlund's see Anderson, *supra* note 17, at 1198–99 (developing an "integration rationale for affirmative action" based on equal opportunity and a democratic civil society).



purposes of Title VII. Before moving to discuss how such a plan could satisfy the second requirement of a lawful affirmative action plan under Title VII, more needs to be said about the “proper purpose” requirement because the doctrinal manifestations of that requirement are not without complication.

*A. Measuring the Existence of a Manifest Imbalance Reflecting Underrepresentation of Blacks or Women in a Traditionally Segregated Job Category*

I have shown that *Weber* and *Johnson* require that an affirmative action plan further a purpose of Title VII, and that preventing discrimination is perhaps the preeminent purpose of the statute. However, in both cases, the test used by the Court to determine whether the employer was acting in a manner consistent with a proper purpose of Title VII might suggest discrimination prevention is not a permissible purpose of an affirmative action program. In *Weber*, the Court posed the question before it as whether employers were free under Title VII to take “race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories.”<sup>143</sup> In *Johnson*, the Court similarly asked whether the employer’s affirmative action plan “was justified by the existence of a ‘manifest imbalance’ that reflected underrepresentation of women in ‘traditionally segregated job categories.’”<sup>144</sup>

The implications of this requirement for an affirmative action plan intended to prevent discrimination are unclear. The requirement may not apply to prevention plans. As discussed in Part II.B.3, *Weber* and *Johnson* arguably involved plans aimed at ameliorating the effects of discrimination—effects that were reflected in the underrepresentation of blacks or women in the employer’s workforce. Indeed, the Court in *Johnson* made an explicit connection between the manifest imbalance test and plans with a remedial purpose when it wrote, “[t]he requirement that the ‘manifest imbalance’ relate to a ‘traditionally segregated job category’ provides assurance . . . that sex or race will be taken into account in a manner consistent with Title VII’s purpose of eliminating the effects of employment discrimination.”<sup>145</sup>

That connection is also apparent from the Court’s description of how the requisite imbalance is to be identified:

In determining whether an imbalance exists that would justify taking sex or race into account, a comparison of the percentage of minorities or women in the employer’s work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special

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<sup>143</sup> *United Steelworkers v. Weber*, 443 U.S. 193, 197 (1979).

<sup>144</sup> *Johnson v. Transp. Agency*, 480 U.S. 616, 631 (1986).

<sup>145</sup> *Id.* at 632.

expertise . . . . Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications.<sup>146</sup>

The Court cited both *Teamsters*<sup>147</sup> and *Hazelwood*<sup>148</sup> in support of this approach, cases in which the Court set forth the requirements of a prima facie case of a pattern and practice of discrimination, despite the *Johnson* Court's statement that a prima facie showing of discrimination was not required.<sup>149</sup>

Thus, one might conclude that when an employer seeks to justify an affirmative action plan on the grounds that it is intended to remedy past discrimination, the Court requires that there be evidence the employer has discriminated in the form of an underrepresentation of women in the workforce, as measured against their representation in the relevant labor pool. When engaging in affirmative action to prevent future discrimination against women, on the other hand, the employer might instead be required to show an imbalance in the gender make-up of the workforce, regardless of the percentage of women in the relevant labor market. The focus would then shift to the presence of small numbers of women in the jobs in question, which would put them at special risk for discrimination. There would be other evidence of the employer's bona fides in the form of the race- or sex-neutral prevention measures I have advocated must be part of an affirmative action prevention program.

In some cases, this distinction would be unimportant. In *Johnson*, for example, the employer justified its decision to prefer a woman for a promotion to a skilled craft position over a similarly qualified male on the ground that none of its 238 skilled craft workers were female, although women constituted 36.4% of the area labor pool.<sup>150</sup> The Court found that the employer was justified in considering as one factor the sex of the applicants for the position in question because of "the obvious imbalance in the Skilled Craft category."<sup>151</sup> A prevention program would have been justified under this approach as well, but without reference to the proportion of women in the relevant labor pool. The focus would be on the risk that a lone female employee or small group of female employees in the Skilled Craft category would be harmed by the operation of stereotypes and the other pressures of token status. Thus, as in *Johnson*, in workplaces where women or minorities are at special risk because of their relatively small numbers,

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<sup>146</sup> *Id.* at 631-32 (citations omitted).

<sup>147</sup> *Teamsters v. United States*, 431 U.S. 324 (1977).

<sup>148</sup> *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977).

<sup>149</sup> *Johnson*, 480 U.S. at 632 ("A manifest imbalance need not be such that it would support a prima facie case against the employer . . .").

<sup>150</sup> *Id.* at 621.

<sup>151</sup> *Id.* at 637.

they might also be underrepresented when compared to their presence in the relevant labor pool.

However, there would be cases where the precise way in which the requisite imbalance was measured would matter. In that important set of cases, my point is that existing doctrine might not need substantial modification to make room for the prevention justification. To review, research suggests that women and blacks are at particular risk for discrimination when they are present in a workforce in numbers below 15%, and the effects of token status dissipate as their numbers increase.<sup>152</sup> Consider the implications for law firm hiring of associates. A law firm with fifty associates might be concerned about the effects of token status on its three black associates and consider (1) taking race-conscious steps to bring more black lawyers into the firm, and (2) making race-neutral changes in the way it recruits, trains, and evaluates associates. The firm's use of a racial preference in hiring as part of this plan would be vulnerable to a Title VII challenge on the ground that because blacks constitute about 6% of recent law school graduates they are not underrepresented at the firm, notwithstanding the risk posed to the black associates because of the racial imbalance in the firm's associate ranks.<sup>153</sup> The doctrinal move to accommodate the use of affirmative action here is not radical. Instead of focusing on work force underrepresentation as measured by comparison to the racial composition of the relevant labor pool—6% black; 6% black—the focus would be on imbalance as measured by the racial composition of the associate work force—6% black; 94% white.

*B. An Affirmative Action Plan Intended to Prevent Workplace Discrimination Need Not "Unnecessarily Trammel" the Rights of Applicants or Employees Not Benefiting from the Plan*

Finally, under *Weber* and *Johnson*, an affirmative action plan must not unnecessarily trammel the rights of employees or applicants who do not benefit from the operation of the plan.<sup>154</sup> This "trammel" analysis includes a cluster of requirements, most of which could be satisfied easily by an employer implementing an affirmative action prevention program, and many of which are not just required by the governing doctrine, but suggested by the research supporting the justification. However, one of those requirements deserves special attention.

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<sup>152</sup> See *supra* Part II.A.

<sup>153</sup> Wilkins & Gulati, *supra* note 17, at 545; see JOHN J. DONOHUE III, FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW 363 n.4 (1997) (raising the question whether employment discrimination law should encourage proportional representation of blacks in all firms or "bunching" of blacks in some firms to help consolidate their power).

<sup>154</sup> *Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 637–38.

The Court concluded in both *Weber* and *Johnson* that the plans did not unnecessarily trammel the rights of whites and men because the plans were designed to *attain* a more balanced work force and not thereafter to *maintain* that balance.<sup>155</sup> In *Weber*, the plan was scheduled to end “as soon as the percentage of black skilled craftworkers in the . . . plant approximate[d] the percentage of blacks in the . . . labor force.”<sup>156</sup> In *Johnson*, the employer had not yet identified a long-term goal for representation of women in skilled craft positions, but the goal was to be based on their representation in the relevant labor pool, which satisfied the Court that the employer’s objective was not to “maintain a permanent . . . sexual balance.”<sup>157</sup>

An employer implementing an affirmative action plan to prevent discrimination would have a less determinate target goal to attain—something greater than 15% of the segment of the work force in question, but not a number that can be set with precision.<sup>158</sup> On one hand, a 35% target, which Kanter suggested was the “tipping point” toward more balanced representation, could be viewed as consistent with existing doctrine. The 35% target is fairly precise, and once achieved can be abandoned, consistent with the purpose of the program.<sup>159</sup>

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<sup>155</sup> *Weber*, 443 U.S. at 208 (“[T]he plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.”); *Johnson*, 480 U.S. at 639 (“The Agency’s plan was intended to *attain* a balanced work force, not to maintain one.”).

<sup>156</sup> *Weber*, 443 U.S. at 208–09.

<sup>157</sup> *Johnson*, 480 U.S. at 640.

<sup>158</sup> Kanter suggested the “tipping point” towards more balanced representation is 35%, but that precise number has not been supported by solid research, although there is some support for it in at least one study. Jackson et al., *supra* note 7, at 555 n.12. Martha Chamallas has reviewed the literature and concluded that 25% is most often cited as the point at which a group goes beyond token representation to achieve a critical mass. Chamallas, *supra* note 20, at 324. Thus, it appears that the question of precisely how many of a category are enough to change a person’s status from token is unanswered by the substantial literature spawned by Kanter’s theory. See Jackson et al., *supra* note 7, at 554 n.1.

<sup>159</sup> The assumption would be that once a workplace is sufficiently integrated, subsequent resegregation, if not extreme, would not warrant conscious racial or gender reintegration. See Stephen Coate & Glenn C. Loury, *Will Affirmative Action Policies Eliminate Negative Stereotypes?*, 83 AM. ECON. REV. 1220 (1993) (concluding that there is some evidence that affirmative action programs intended to break down stereotypes could be temporary); cf. *Johnson*, 480 U.S. at 639 (in concluding that the employer’s plan was temporary, the Court noted that the Agency’s director testified that “while the ‘broader goal’ of affirmative action, defined as ‘the desire to hire, to promote, to give opportunity and training on an equitable, non-discriminatory basis,’ is something that is ‘a permanent part’ of ‘the Agency’s operating philosophy,’ the broader goal ‘is divorced, if you will, from specific numbers or percentages’”) (citation omitted); Akhil Reed Amar & Neal Kumar Katyal, *Bakke’s Fate*, 43 UCLA L. REV. 1745, 1754 (1996) (“as . . . affirmative action achieves its long-run effect of healing racial separation . . . race will gradually become irrelevant and—like eye color or blood type—will cease to be significant for university admissions”); Malamud, *supra* note 1, at 966

Both *Weber* and *Johnson* offer strikingly strong support for a target goal of 35%. In *Weber*, the employer's target for black hiring was 39%, and the employer was starting with a work force that was less than 2% black.<sup>160</sup> In *Johnson*, the goal, which was subject to revision, was 36.4%, and there was not one woman in a skilled craft position.<sup>161</sup>

On the other hand, the Court made it clear that there are limits to its patience on this matter. An affirmative action plan "that can be equated with a permanent plan of 'proportionate representation by race and sex,' would violate Title VII."<sup>162</sup> Moreover, if the preferences are too great in the sense that the employer's targets far exceed the proportion of blacks in the relevant labor pool, for example, there is evidence that affirmative action might create disincentives among blacks to invest in improving their skills.<sup>163</sup> Finally, it might take a long time for an employer to achieve its stated goal under a discrimination-prevention affirmative action program.<sup>164</sup>

However, not only were the remedial targets permitted in *Weber* and *Johnson* high, and the affirmative action plans deemed lawful by the Court therefore likely to last for a substantial period, those targets were themselves fairly arbitrary, at least in the sense that they were based on debatable conclusions about the demographics of the relevant labor pool and assumptions about what a workplace would look like absent discrimination.<sup>165</sup> That it might take a long time for the employer to achieve its stated goal was not troubling to the Court in *Johnson*, for example, given that it concluded the plan was a moderate one that visited only minimal intrusion on the legitimate expectations of other employees.<sup>166</sup>

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(distinguishing indeterminacy of diversity rationale from a rationale that identifies a social problem that affirmative action can help cure and therefore suggests its stopping point, for example, when inequality between blacks and whites caused by societal discrimination has ended); Ayres & Vars, *supra* note 117, at 1638 n.216 (a program would be temporary if it lasted only as long as the effects it seeks to counteract, or to demonstrate to employers the viability of nondiscriminatory employment practices, or if it had a fixed end date or provision for regular review).

<sup>160</sup> *Weber*, 443 U.S. at 210.

<sup>161</sup> *Johnson*, 480 U.S. at 621.

<sup>162</sup> *Johnson*, 480 U.S. at 656 (O'Connor, J., concurring).

<sup>163</sup> Coate & Loury, *supra* note 159, at 1221.

<sup>164</sup> Because women constitute a much larger percentage of the labor force than blacks, discrimination prevention programs based on attaining a critical mass of women may reach their goal much sooner than programs aimed at hiring or promoting a critical mass of black employees.

<sup>165</sup> See Liu, *supra* note 109, at 427–28 (noting that the remedial stopping point is based on achieving some distribution that would exist absent discrimination, which cannot be quantified with any specificity); Schuck, *supra* note 6, at 21–22.

<sup>166</sup> *Johnson*, 480 U.S. at 639–40, 640 n.16 (explaining that it is not surprising that the plan had no explicit end date, because the employer anticipated only gradual increases in the representation of women, due in part to "the low turnover that exists in these positions and the

The Supreme Court's recent decision in *Grutter v. Bollinger*<sup>167</sup> may be instructive here. The Court found that the University of Michigan Law School's use of racial preferences in admissions was narrowly tailored to achieve its goal of seeking a diverse student body by enrolling in each class a "critical mass" of underrepresented minority students.<sup>168</sup> The Court refused to exempt race-conscious admissions programs from the requirement that the government's use of race must have a logical end-point. However, at least in the context of higher education, the Court seems comfortable with sunset provisions or periodic reviews to determine whether preferences are still necessary.<sup>169</sup>

Consider once again our hypothetical law firm. Assume that the firm decides that the best way to prevent discrimination against its three black associates would be to implement a race-neutral discrimination prevention plan and to increase the number of black associates (now three of fifty) through the use of racial preferences in hiring. Further assume that in the next ten years the firm plans to double in size—increasing the number of associates from fifty to one-hundred. The prevention justification would, I am suggesting, permit the firm to use racial preferences in pursuit of the goal of hiring approximately twenty-five black associates in that ten-year period, or 50% of its new associates, thereby increasing the percentage of black associates from 6% to 31%.

Under *Weber* and *Johnson*, the devil would then be in the remaining details, and it appears likely that the firm could try to achieve this goal consistent with existing doctrinal requirements. A plan that does not trammel the rights of employees or applicants who are not its intended beneficiaries has the following additional characteristics: It does not require the discharge of any employee or otherwise unsettle some legitimate, firmly rooted expectation in a job, either at the hiring or promotion stage; and it sets aside no specific number of positions for members of one race or sex—race or sex is simply one factor to be considered among others in a competitive assessment of the fitness of applicants for a particular position covered by the plan.<sup>170</sup> Thus, the firm could lawfully make race a factor when considering applicants for associates' positions along with the other factors the firm considers when making hiring decisions, such as performance in on-campus and workplace interviews, quality of law school attended, class rank, law review membership, performance in a summer program,

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small numbers of persons who can be expected to compete for available openings") (citation omitted).

<sup>167</sup> 123 S. Ct. 2325 (2003).

<sup>168</sup> *Id.* at 2342–43.

<sup>169</sup> *Id.* at 2346.

<sup>170</sup> See *Johnson*, 480 U.S. at 638; *Weber*, 443 U.S. at 208; see also *Grutter*, 123 S. Ct. at 2342–43 (explaining that a quota system—"a program in which a certain number or proportion of opportunities are reserved exclusively"—is impermissible, but that it is lawful for a university to use race or ethnicity "in a good faith effort to come within a range" while still ensuring that each candidate competes with all other qualified applicants);

references, writing samples, interest, and course work.<sup>171</sup> So long as the hiring decisions indeed rest on a multitude of factors, and the firm intends at some identifiable point to thereafter eschew the use of race in making decisions, the Court could, as in *Johnson*, conclude that the plan is “a moderate, gradual approach to eliminating the imbalance in its work force, one which establishes realistic guidance for employment decisions, and which visits minimal intrusion on the legitimate expectations of other employees.”<sup>172</sup> Again, while moving toward a 30% goal may require a long-term commitment to the use of racial or gender preferences, long-lasting preferences are tolerated under existing law. The doctrinal alteration required here would be unhinging the target number from the relevant labor pool and focusing instead on a target number associated with the reduction or elimination of token status effects. It would not require a new way of cabining employer discretion to engage in discrimination otherwise prohibited by Title VII.

## V. CONCLUSION

I have tried to show that from the perspective of psychology and organizational behavior theory (without reference to law) the problem of workplace discrimination against blacks and women could be addressed if employers changed the ways in which they recruit, hire, train, deploy, evaluate, compensate, discipline, reward, and promote their employees. This body of research also suggests that increasing the number of blacks and women in the jobs in question would go a long way toward preventing outcomes for them that are the product of conscious and unconscious stereotyping.

So why not require all employers to enact these affirmative action prevention programs? First, as a practical matter, such a regime would be unworkable because the target workforce representation suggested by the literature would exceed, in many instances, the availability of blacks, for example, in the relevant labor pool. Not all employers can attract a workforce that is 30% black where

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<sup>171</sup> Wilkins & Gulati, *supra* note 17, at 544–49 (discussing the hiring process at elite law firms).

<sup>172</sup> *Johnson*, 480 U.S. at 640. The use of modest and measured preferences is suggested by the theoretical and empirical work that justifies the prevention justification, even apart from the Supreme Court’s Title VII affirmative action jurisprudence. Large, obvious, rigid racial preferences that impose a serious cost on identifiable individuals can lead to resentment, hostility, and reinforced stereotypes along racial lines, as well as triggering unconscious racial stereotypes by making race more, rather than less, salient. But these effects are significantly diminished where race is only one criterion among other relevant merit-related criteria. See *supra* Part II.A; cf. Estlund, *supra* note 32, at 88–94 (concluding that because modest and measured preferences do not trigger stereotypes or otherwise vitiate the beneficial effects of cooperative interaction in the workplace across racial line, the results prescribed by her integration thesis roughly mirror the current state of the Supreme Court’s Title VII affirmative action decisions).

blacks constitute only 13% of the population. Moreover, such a regime would send strong signals that would distort investments in human capital among members of affected groups.<sup>173</sup> Finally, the research is merely suggestive and not prescriptive. There is as yet no blueprint for implementing a successful program that uses racial or gender preferences to prevent discrimination. Organizational context and commitment will be important determinants of success.<sup>174</sup>

Bringing law into the picture, the parallels are striking. The Supreme Court has given employers incentives to take steps to prevent workplace discrimination by making liability for certain types of discrimination and for punitive damages turn on those employer efforts. There is no suggestion that the Court has mandated that employers use preferences to try to prevent discrimination, but what I have shown is that the Court's Title VII jurisprudence, if it can be taken seriously on the importance of discrimination prevention, might permit the voluntary use of racial or gender preferences in pursuit of the prevention objective.

Is this much ado about nothing, on the theory that few employers will take the operational and legal risks necessary to try to prevent discrimination by restructuring the way they deal with people in the organization and by using race and sex to allocate scarce employment resources? Not surprisingly, I do not think so. Many firms, in fact, many leading firms in this economy, are already engaged in ambitious workplace programs of encouraging and managing diversity.<sup>175</sup> And while I have concluded that using preferences in the context of some of those programs could be unlawful, those programs are evidence that employers are willing to take operational and legal risks in pursuit of gaining a perceived competitive advantage.<sup>176</sup> Employers might be willing to engage in similarly ambitious prevention efforts on the theory that there are operational or competitive advantages to wringing discrimination out of their human resource systems.<sup>177</sup>

As I sit here today, writing at a time when the business pages are full of revelations about greedy managers looting corporate coffers in pursuit of their self-interest, it seems naïve to suggest that employers might take steps to prevent workplace discrimination because it is consistent with their conception of a just society. However, I know there are individuals in management positions who

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<sup>173</sup> Strauss, *supra* note 114, at 1625.

<sup>174</sup> *Perestroika*, *supra* note 3, at 1331.

<sup>175</sup> See McGinley & Yelnosky, *supra* note 118, at 206–07; Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *Gutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241 & No. 02-516).

<sup>176</sup> Devon Carbado and Mitu Gulati have written that firms operate under a market-based diversity constraint, which requires them to hire women and minorities to maintain their legitimacy in the market. See *The Law and Economics of Critical Race Theory*, *supra* note 129.

<sup>177</sup> See Selmi, *supra* note 6, at 1277–314.



view that as part of their role, although they tend not to be the subjects of newspaper stories. It is also unclear how many employers might follow if the pioneering firms demonstrate how to effectively implement discrimination prevention programs and manage diversity, which has been shown, in some studies and over the long-haul, to result in better problem-solving and more creative operation.<sup>178</sup>

Thus, to those who respond that this is a lot of ink spilled in defense of plans that will be rare, I am reminded of my reaction to the words of Stephen Carter, who has referred to affirmative action as “racial justice on the cheap.”<sup>179</sup> I certainly agree that affirmative action in employment is not responsive to the needs of the most seriously disadvantaged, and that social policy should be targeted at the underlying causes of continued racial disadvantage. But to the extent that the kinds of plans I have outlined here advance in some small way the cause of racial justice, and I believe they would, I will take my racial justice anyway I can get it.

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<sup>178</sup> See generally Carbado & Gulati, *supra* note 40.

<sup>179</sup> STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 71–72 (1991).

